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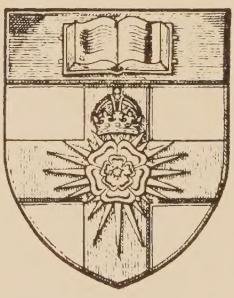

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518	24	an error which	an error the avoidance of which
593	2	1923	1925
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646, 647	*Jenkins K.C.* and *Henry Johnston* appeared for the testator's son and *Vaisey* for the daughter, the other residuary legatee.		

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

BEAUMONT *v.* JEFFERY.

LAWRENCE J.

[1924. B. 362.]

1924

May 15; *July* 8.

Manor—Lord of Manor—Steward of Manor—Custody of Court Rolls—Lord's Obligations to Tenants—Tenants' Rights to Production—Lord's Liability for disposing of Court Rolls—Lord's Right to recover Possession of Court Rolls—Trust to produce attaching to Possession by Stranger—Action of Detinue—The Limitation Act, 1623 (21 *Jac.* 1, *c.* 16), *s.* 3—*Conversion—Demand and Refusal.*

The plaintiff, as lord of the manor of Great Tey, which he acquired by purchase in 1923, brought the present action of detinue to recover possession of certain ancient court rolls of that manor, which were of mere historical interest and which before his purchase the plaintiff had seen advertised for sale by the defendant, who, having purchased them in 1902, from one P., a waste paper dealer, had commenced advertising them for sale ten years before the commencement of the present action:—

Held, first, that in the absence of evidence to the contrary, it must be presumed that P. acquired the rolls lawfully in the ordinary course of his business from either the lord or the steward of the manor, and, following *Anon.* (1754) 2 Ves. Sen. 578 and *Wells* (*Dean and Chapter of*) v. *Doddington* (1845), 2 Coll. 73, that, as the position of the plaintiffs' predecessor in title as trustee of the rolls, while they remained in his possession, did not make it illegal for him to part with them to a stranger, who came under the same obligation as the lord to produce them, the plaintiff was not entitled to recover the rolls.

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Held, secondly, that, even if an action of detinue would lie, yet, upon the true construction of s. 3 of the Limitation Act, 1623, the words "goods and chattels" were mentioned only in reference to actions of replevin, and that as the action was an action of detinue and the cause of action—namely, the assertion by the defendant of an adverse title by advertising the rolls for sale—arose more than six years before the commencement of the action, the action was barred by the statute.

ACTION OF DETINUE.

The defendant was a bookseller carrying on business at Barnes, and part of his business consisted in dealing in documents of historical interest, as, for instance, deeds, manuscripts, and autograph letters, and he often, as he averred, bought and sold old manorial court rolls. In 1902 the defendant purchased from one Poole, a waste paper dealer in Portugal Street, Lincoln's Inn Fields, with whom he had had previous business dealings, a number of old documents which included the court rolls of the manor of Great Tey in the county of Essex, ranging over a period from 1399 to 1659, the subject matter of the present action. The defendant from time to time advertised those court rolls for sale in various newspapers, and about ten years ago he advertised them in an Essex newspaper, the county in which the manor was situate. As he had not succeeded in disposing of the documents privately, he sent them in June, 1923, to Messrs. Hodgson & Co., the well known auctioneers in Chancery Lane, with instructions to sell them at their auction sale on June 22, 1923.

The plaintiff was a solicitor who had already acquired between thirty and forty manors and was the steward of about 120 manors. In July, 1922, he read an advertisement which had been inserted by the defendant in an Essex newspaper in reference to the court rolls, the subject matter of the action; and in June of the following year he added to the number of the manors he already then possessed by purchasing the manor of Great Tey, of which there were not more than twelve copyhold and five freehold tenants, and that manor was conveyed to him in fee simple by a deed dated June 19, 1923. On the following day the plaintiff wrote to the defendant a letter dated June 20, 1923, as

follows: "I understand that about a year ago you had for sale various early court rolls relating to the manor of Great Tey, namely, from 1399 to 1659. Will you kindly let me know if these are still in your possession, or, if not, to whom you have sold them." In reply, the defendant wrote to the plaintiff that he had sent the court rolls to Messrs. Hodgson & Co. for sale by auction, and thereupon the plaintiff, through his solicitors, gave notice to Messrs. Hodgson & Co., that he claimed the court rolls and requested them to withdraw the same from the sale. Messrs. Hodgson & Co. thereupon declined to proceed with the sale of the rolls, which remained in their custody pending the result of the action, which the plaintiff shortly afterwards commenced, and in which he claimed delivery of the rolls, which he alleged were wrongfully detained by the defendant, and damages for such detention. The defendant pleaded possession and his willingness to produce the rolls to any person entitled to refer to them for evidence of his title: he also pleaded laches and the Statute of Limitations, 1623. The defendant also counter-claimed damages by reason of the plaintiff having wrongfully induced the auctioneers to withdraw the documents from the sale and to retain them in their custody as against the defendant.

Mr. H. Stuart Moore, a member of the English Bar experienced in searching court rolls for evidence of customary rights, gave evidence on behalf of the plaintiff that the rolls were, in his opinion, of more than mere historical interest, but might also be required to be produced and examined, notwithstanding their antiquity, for the purpose of proving or disproving customary rights.

Jenkins K.C. and *Dighton Pollock* for the plaintiff. The lord is entitled to recover the rolls from the defendant: the claim is not a vexatious or unreasonable one, as, although the rolls relate to a period before 1659, tenants may yet desire to rely on them for evidence of some right or custom, as was the case in *Payne* v. *Ecclesiastical Commissioners* (1), where

(1) (1913) 30 Times L. R. 167.

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a document in 1599 indicating the absence of a custom to fish was relied upon by the defendants.

The lord is the owner of the court rolls, but he is also the trustee and guardian of them as evidence of the tenants' rights: and the Court has granted a mandamus for inspection of the rolls to ascertain the existence of any custom against the tenants' right of cutting timber without the lord's licence: *Rex* v. *Tower*. (1) That right of the lord is subject to the right of the steward to have possession of the rolls for the purpose of enabling him to perform his duties as steward: *In re Jennings*. (2) The rolls are in the nature of public documents for the benefit of the tenants as well as of the lord: *Warriner* v. *Giles*. (3) A tenant may at any time resort to the court rolls and use them as evidence, and the Court will grant leave to inspect the rolls on the application of a tenant who has been refused permission by the lord: *Cooper* v. *Emery* (4); *Rex* v. *Shelley*. (5) A tenant of a manor was held entitled to inspection of all the court rolls to establish customary rights over commons in the manor: *Warrick* v. *Queen's College, Oxford*. (6) Moreover, the Legislature has recognized the right of any person interested in the enfranchised land to inspect the court rolls of the manor of which that land was held: Copyhold Act, 1894, s. 62, sub-s. 1; s. 64, sub-s. 3. That the lord is not the owner of the rolls in the same sense as the owner of a freehold estate is the owner of the title deeds, but holds them subject to the tenants' rights of inspection, is part of the general law of the land, and the defendant cannot plead ignorance of that general law and is bound to restore the documents to the lord, their rightful owner: and, as the rolls are in the nature of trust property, no Statute of Limitations can apply to them.

F. H. L. Errington for the defendant. In all the cases cited the proceedings were as between the tenants and the lord, and it is not disputed that in such cases a tenant, whose interest is involved, is entitled to production of the rolls. The

(1) (1815) 4 M. & S. 162.
(2) [1903] 1 Ch. 906.
(3) (1734) 2 Str. 955.
(4) (1844) 1 Ph. 388.
(5) (1789) 3 T. R. 141.
(6) (1867) L. R. 3 Eq. 683.

lord is not in any general sense a trustee of the rolls, and the cited cases only show that the lord, while in the possession of the rolls, is bound to produce them to a person interested and who does not claim adversely. There are no authorities which extend the lord's liability to produce the rolls to a subsequent lord, whose predecessor had parted with them. It is not illegal for the lord to part with or dispose of the court rolls: *Anon.* (1); *Wells* (*Dean and Chapter*) v. *Doddington* (2), although he may possibly be liable to tenants in damages. If documents in the hands of a stranger, about which the dispute is concerned, are shown to be the court rolls of a manor, the Court will order that stranger to produce them to a tenant for inspection; in other words, the lord's obligation to produce will follow the possession of the court rolls in the hands of a stranger: *Anon.* (1) That case did not decide that a stranger having possession of the rolls would be under any obligation to the lord: the defendant has never denied his obligation and offers to produce the rolls to any person entitled to inspection: that is the limit of the defendant's obligations. It appears from the decision in the last case that the lord is not a trustee of the court rolls in the general sense of the term, but is subject to a sort of fiduciary obligation to produce them to tenants for inspection. The rolls, therefore, are not trust property so as to be exempt from the Statutes of Limitation.

It has not been proved how the rolls left the custody of the lord and came into the hands of Poole; but in the absence of evidence to the contrary the Court will assume that they came into Poole's possession lawfully: it is possible that all parties having any interest in the rolls concurred in parting with them. Considering the length of time they have been out of the lord's possession, the Court will assume laches on the part of the lord. This is not a claim for the production of the rolls, but is an action of detinue, which must be commenced within six years next after the cause of action and not after: Statute of Limitations, 1623 (21 Jac. 1, c. 16), s. 3. The cause of action here was the wrongful act of conversion of the rolls,

(1) 2 Ves. Sen. 578. (2) 2 Coll. 73.

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and their conversion took place when dominion over the rolls was asserted as against the lord. That assertion was made when the defendant first advertised the rolls for sale ten or more years ago. This is not a case of a breach of duty by a bailee of property, where the owner has the option either to sue for wrongful conversion of the property (if he discovers and can prove it) or to wait until there is a breach by the bailee of his duty to deliver up on demand. Here the defendant was never a bailee and the statute commenced to run from the first wrongful act of conversion: *Wilkinson* v. *Verity* (1); *London and Midland Bank* v. *Mitchell.* (2)

[The hearing was then adjourned for the purpose of enabling an examination to be made of the court rolls in question in the action, and upon the resumption of the hearing on July 8, 1924, it appeared that several Courts of the manor had been held including a court leet.]

Jenkins K.C. in reply. The court leet was a court of record: Scriven, 7th ed., 434; 4 Bl. Com. 270. The rolls are records in the court leet and are public documents. They belonged to the lord, the tenants and the copyholders together, each of whom having a right against the others to the use of them, and all against a stranger: *Langham* v. *Lawrence.* (3)

The presumption which the defendant claims should be made, that the lord, tenants and copyholders concurred in disposing of the rolls, is an extravagant one: it is more reasonable to presume, if any presumption ought to be made, that the lord, being a trustee of the rolls, parted with possession of them illegally. But this is a case in which the Court will not make any presumption at all; it will only make presumptions in cases where incorporeal hereditaments, as, e.g., a right of way or of common, are in dispute: only incorporeal hereditaments can be claimed by prescription: 2 Bl. Com. 222.

In an action to recover land or a chattel the plaintiff cannot succeed by virtue of his mere possession. There is no

(1) (1871) L. R. 6 C. P. 206, 210. (2) [1899] 2 Ch. 161, 165, 166.
(3) (1662) Hardr. 180.

evidence as to how Poole became possessed of the rolls and no presumption can be drawn. The plaintiff, as lord of the manor, has prima facie the right to the rolls, and it is for the defendant to prove a better title: *Wilkinson* v. *Proud.* (1)

As to the Limitation Act, 1623: first, it does not apply to title deeds: they are not "goods or chattels" within s. 3 of that Act; and consequently that statute does not apply to the court rolls. As evidence of the title of the lord and of the tenants the rolls are in the nature of title deeds, they do not come within the definition of "chattels": Jacob's Law Dictionary, 1809, by Tomlin; see headings, "Chattels" and "Detinue of Charters." If the rolls are not chattels within the meaning of the statute, then upon the true construction of s. 3, an action of detinue has reference to goods and chattels only, and therefore an action of detinue for the court rolls is not within the section. But if the action is affected by the section, since the court rolls are trust property, they are not within the statute.

Further, there is no question of bailment in this case. *Wells* (*Dean and Chapter*) v. *Doddington* (2) was a case of bailment and is not applicable to the facts of this case. As the defendant has failed to prove that the lord rightfully parted with the documents, the rolls, when they left the custody of the lord, passed to each successive holder, subject to the trust which attached to them under the general law, of which the defendant must be deemed to have had knowledge. There was no wrongful conversion until 1923, and the statute only began to run against the plaintiff from June, 1923, the date of the plaintiff's demand for delivery of the rolls and the defendant's refusal: *Clayton* v. *Le Roy* (3); *Spackman* v. *Foster* (4); and *Miller* v. *Dell* (5); in which cases there was no conversion previous to demand and refusal.

LAWRENCE J. In this action the plaintiff claims delivery to him of certain manor court tolls alleged to be wrongfully

(1) (1843) 11 M. & W. 33.
(2) 2 Coll. 73.
(3) [1911] 2 K. B. 1031, 1055
(4) (1883) 11 Q. B. D. 99
(5) [1891] 1 Q. B. 468.

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detained by the defendant. [His Lordship then stated the facts and proceeded as follows:] I think it is plain upon the authorities that, as between the lord of the manor and the steward, the steward is entitled to the custody of the court rolls subject to the obligation of allowing the lord to have the custody of them for special purposes: *In re Jennings.* (1) It also, I think, is plain from the decisions which have been cited that the tenants of a manor are entitled to the production of such court rolls as are in the possession of the lord or of the steward for the purpose of evidencing their title, whether the dispute be between the tenant and the lord or between the tenants inter se. The proposition advanced on behalf of the plaintiff is that, because the tenants have this right to production, the lord is a trustee of the rolls for the tenants and, therefore, cannot lawfully part with them to a stranger. If that were the true position, the plaintiff would be entitled to succeed in this action, but, in my opinion, the proposition so advanced goes too far and cannot be maintained to the full. In the present case the rolls in question are old, as they relate to a period anterior to the year 1659. It may well be that the lord and steward came to the conclusion that the rolls were too old to be required for evidential purposes, and decided to get rid of them as waste paper. Further, it appears from the cases, and particularly from the *Anonymous* case (2) cited by Mr. Errington, that when court rolls have been parted with to a stranger, the stranger is placed in the position of the lord qua the tenants and is under the same obligation as the lord to produce the rolls to the tenants. To that extent, therefore, court rolls differ from private documents, and carry with them an obligation into whosesoever hands they may come, and to that extent the custodian for the time being may be said to be a trustee or guardian of the rolls for the tenants of the manor. In none of the cases or books cited by counsel is it suggested that the lord cannot lawfully part with the rolls to a stranger: on the contrary, Lord Hardwicke decided the *Anonymous* case (2) on the footing that the rolls were in the lawful custody of the stranger.

(1) [1903] 1 Ch. 906. (2) 2 Ves. Sen. 578.

Moreover, in *Wells* (*Dean and Chapter*) v. *Doddington* (1), where the lord had parted with the rolls to a lessee of the manor, it was held that the lord was not entitled to recover the rolls, although the lease had long since expired. In that case the lease of the manor expired in the year 1820. In 1822 the lord made a request that the rolls should be handed back to him, but such request was not complied with. In 1844 the lord brought an action to recover the rolls, and it was held that he was too late, as the conversion by the defendant dated back to his refusal to hand back the rolls in 1822. This case shows that, whatever the result of parting with the rolls may be to the lord, such parting is not an illegal act, and that he is not necessarily entitled to recover them. It would seem strange if, in a case where the lord had sold old court rolls in order to obtain more room in his office, the vendor's successor in title could recover the rolls from the purchaser without any payment; yet this was the contention put forward on behalf of the plaintiff.

Further, Mr. Jenkins laid some stress upon the absence of evidence in the present case as to the circumstances in which Mr. Poole became possessed of the rolls. In my opinion, the proper inference is that Mr. Poole came into possession of these rolls in the ordinary course of his business as a waste paper merchant. Further, I think the reasonable inference is that Mr. Poole acquired the rolls from the rightful owner, whoever he may have been. The plaintiff was aware, at the time when he purchased the manor, that the rolls in question were not in the possession of the lord and, therefore, were not included in the purchase of the manor. Moreover these ancient rolls are not essential to the ownership of the manor nor are they at all likely to be required by the lord in order to enable him to perform his obligations to the tenants of the manor. The evidence as to the possibility of the rolls in question being required in the case of this small manor, which has only twelve copyhold and five freehold tenants, was most unconvincing. The plaintiff on his purchase acquired all the court rolls relating to the manor since the year 1659, and, in my

(1) 2 Coll. 73.

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opinion, the rolls so acquired by him are amply sufficient for all practical purposes. The truth is that the rolls now sought to be recovered are of historical interest only, and the plaintiff, being interested in historical documents, desires to possess them. In these circumstances, I think that he ought to pay for them. In view of the contention put forward by the plaintiff in this case, it strikes me as a significant fact that both Messrs. Hodgson & Co. and the defendant deposed to having from time to time in the ordinary course of business openly bought and sold the court rolls of various manors as documents of historical interest, and that the plaintiff must have been fully aware of this fact.

Having stated what I conceive to be the true position, I will now deal quite shortly with the propositions advanced by Mr. Jenkins. He contended, first, that the lord for the time being of the manor of Great Tey held the court rolls of that manor as a trustee, and that, therefore, the defendant must be assumed to have acquired the rolls in question under a breach of trust of which he had notice. For this proposition Mr. Jenkins relied upon *In re Jennings* (1), and particularly upon the extract quoted in the judgment from Elton's Law of Copyholds, 2nd ed., p. 314, which contains the passage: "But as the lord is, in respect of the court rolls, 'a trustee and guardian of the evidence of the tenants' rights,' it seems that the steward is not entitled to hold the rolls as against the lord, and if there is proof of any improper conduct on the part of the steward, the Courts will order the rolls to be delivered to the lord, but, if there is no suggestion of misconduct, the Courts will not deprive the steward of the custody." That case and the passage there quoted dealt with the question whether the lord or the steward is entitled to the possession of the court rolls and not with the question whether the lord has power to part with the possession of them, either with or without the sanction of the steward or the tenants. As I have already stated, the lord is, in my judgment, a trustee and guardian of the court rolls for the tenants to this extent only, that, while the rolls are in his

(1) [1903] 1 Ch. 906, 912.

possession, he is bound to produce them to the tenants, and his ownership is limited by this obligation. I express no opinion on the question whether the Court, at the instance of a tenant of the manor, would restrain the lord from destroying or parting with the possession of the court rolls. It may well be that the Court would recognize and in some way protect the interest which every tenant of the manor has in the court rolls, but that is not the question which the Court has to consider in the present case. Here, the rolls in question have been out of the possession of the lord for at least twenty-two years before this action was commenced, and it is not suggested that any tenant of the manor has been inconvenienced or requires them to be restored to the lord for the purpose of furnishing evidence of any custom which he desires to establish or for any other purpose.

The next point dealt with by Mr. Jenkins is the defence of the Statute of Limitations. First, he contended that the statute of James does not apply to title deeds or documents, such as court rolls; and he cited passages from various authorities, including Jacob's Law Dictionary, with the object of showing that court rolls are not "goods or chattels" within the meaning of s. 3 of the Limitation Act, 1623. In my opinion, the words "goods or chattels" are mentioned in that section only in reference to actions of replevin and do not apply to actions of detinue. If that be the true construction, it follows that an action for detinue must be brought within six years next after the cause of such action and not after. That the present action is one of detinue, for the rolls in question cannot be disputed, nor is the date when the cause of action arose seriously in dispute. Moreover, the following passage in Jacob's Law Dictionary under the head, "Detinue of Charters"—namely, "but, if the tenant in fee simple give away the deeds of the land, the heir may not have this action" (i.e., an action of detinue)—seems to me to support the view that where the lord of a manor gives away or sells the court rolls, neither he nor his successor may have an action for detinue. Be that as it may, it is clear that in this case the cause of action arose more than six years before this

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action was commenced. The defendant asserted his adverse title to the rolls in question as soon as he advertised them for sale about ten years before action brought. The Act of 1623 therefore affords a complete answer to the plaintiffs' claim.

In the result I hold that the action fails and must be dismissed with costs. There will be no order on the counterclaim as to costs or otherwise.

Solicitors for the plaintiff: *Beaumont, Son & Rigden.*
Solicitors for the defendant: *J. Tickle & Co.*

H. C. H.

LAWRENCE J. 1924 *Oct.* 14, 22.

In re BEIRNSTEIN.

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[1924. B. 955.]

Will — Construction — Direction to pay any Sums of Money secured on "mortgage" of Testator's Freeholds out of Residue—Vendor's Lien for unpaid purchase Money—Real Estate Charges Act, 1854 (*Locke King's Act* (17 & 18 *Vict. c.* 113)—*Real Estate Charges Act,* 1867 (30 & 31 *Vict. c.* 69), *ss.* 1, 2.

A testator, who at the date of his will in 1912 was the owner of several freehold properties, one of which was subject to a mortgage, and of leasehold and other personal estate, gave and bequeathed all the freehold and leasehold properties of which he might die possessed upon trusts in favour of certain of his grandchildren and great-grandchildren, and the residue of his estate upon trust for sale and conversion; he then directed that his trustees should out of the moneys thereby produced pay (inter alia) his debts and legacies, and should out of the residue of such moneys pay and discharge "any sums of money secured on mortgage of any of my said freehold and leasehold properties," and should stand possessed of the residue of such moneys in trust to divide the same as therein mentioned.

After the date of his will the testator paid off the mortgage and took a reconveyance of the mortgaged property.

Shortly before his death, in June and October, 1917, the testator contracted to purchase certain freehold properties, in respect of which he paid deposits, leaving balances of the purchase moneys owing to the respective vendors.

On December 23, 1917, the testator made a final codicil, by which, after revoking the appointment of one of his executors and bequeathing a legacy, he confirmed his will in all other respects.

The testator died on December 26, 1917, without having completed the purchases or paid the balances of the purchase moneys; and shortly after his death his executors completed the purchases and paid the balances of the purchase moneys; whereupon the question arose whether, as between the persons claiming under the testator's will, those balances ought to be borne by the freehold properties of the testator in respect of which the same were payable, or ought to be satisfied out of his residuary estate:—

Held, that, inasmuch as a vendor's lien for unpaid purchase money differs essentially from a "mortgage," even in the modern and wider sense of that term—in that the former is created by operation of law and is merely incident to a contract and a contract which does not constitute the relationship of mortgagor and mortgagee, while the latter is the creature of contract—upon the true construction of the will in the absence of any context enlarging the meaning of the term "mortgage," the balances of the unpaid purchase moneys owing at the testator's death were not "sums of money secured on mortgage"; and, therefore, no contrary intention was signified by the direction in the will to pay and discharge such sums out of the testator's residuary estate, so as to exclude the operation of Locke King's Act, 1854, which by virtue of s. 2 of the Real Estate Charges Act, 1867, extends to a vendor's lien for unpaid purchase money; with the result that the balances in question ought to be borne by and satisfied out of the freehold properties in respect of which the same were payable and the devisees thereof were not entitled to have those balances discharged out of the testator's residuary estate.

Held, further, that the confirmation of the will by the last codicil thereto, although executed after the mortgage on the testator's freehold property had been paid off and after the vendors' lien had arisen, had not the effect of extending the meaning of the words, "any sums of money secured on mortgage of any of my said freehold and leasehold properties," so as to include the balances of unpaid purchase moneys in question.

ADJOURNED SUMMONS.

Harris Mark Beirnstein, who at the date of his will owned several freehold properties, one of which was subject to a mortgage, and also leasehold and other personal estate, made his will dated October 7, 1912, whereby, after appointing executors and trustees thereof and after giving certain specific and pecuniary legacies, the testator gave and bequeathed all his real and the residue of his personal estate to his trustees, as to all his freehold and leasehold properties of which he might die possessed upon certain trusts in favour of his grandchildren and great-grandchildren, and as to all the residue and remainder of his said real and personal estate

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upon trust for sale and conversion. The testator then directed that his trustees should with and out of the moneys produced by such sale and conversion and out of his ready money pay his funeral and testamentary expenses, debts and legacies, and should out of the residue of such moneys pay and discharge " any sums of money secured on mortgage of any of my said freehold and leasehold properties " and all death duties payable in connection with his estate, and should stand possessed of the residue of such moneys in trust to divide the same equally between all such of his said grandchildren who should be living at his decease, except his grandson Arnold Beirnstein and the children of his son Barnett I. Beirnstein. The will also contained power for the trustees to borrow money on " mortgage " of his said freehold and leasehold properties or any part thereof for the purpose of improvements and power to invest trust moneys in the purchase on " upon mortgage " of any real or leasehold property in England or Wales.

After the date of his will the testator paid off the said mortgage upon his freehold property and took a reconveyance of that property.

Shortly before his death, that is to say, in June and October, 1917, the testator contracted to purchase certain freehold properties in respect of which he paid deposits amounting in the aggregate to upwards of 3000*l.*, leaving balances of purchase moneys amounting in the aggregate to upwards of 21,000*l.* owing to the respective vendors, each of whom, therefore, was entitled to a lien for the unpaid balance of his purchase money.

On December 23, 1917, the testator made a fourth and final codicil to his will whereby, after revoking the appointment of one of his executors and trustees, and after bequeathing a pecuniary legacy, he confirmed his will in all other respects.

On December 26, 1917, the testator died without having completed the purchases or paid any of the balances of the purchase moneys. The value of the testator's freehold and leasehold properties, including the properties contracted to be

purchased, amounted at his death to about 60,000*l.* and the value of the rest of his estate to about 74,000*l.*

Shortly after the testator's death his executors completed the purchases and paid the balances of the purchase moneys. This summons was taken out by the trustees for the determination of the question whether, as between the persons claiming under the testator's will, the balances of the purchase moneys ought to be satisfied out of the testator's residuary estate or ought to be borne by and satisfied out of the properties in respect of which the same were payable.

W. H. Gover for the trustees.

D. D. Robertson for Arnold Beirnstein, a grandchild interested in the devised freehold estates. The balances of the purchase moneys are payable out of the testator's residuary estate, since they are " sums of money secured on mortgage " within the meaning of the expression in the will. In *Rose* v. *Watson* (1) Lord Cranworth said that, " When, instead of paying the whole of his purchase money, he pays a part of it, it would seem to follow, as a necessary corollary, that . . . . he (the purchaser) acquires a lien, exactly in the same way as if upon the payment of part of the purchase money the vendor had executed a mortgage to him of the estate to that extent." That dictum was quoted by Stirling L.J. in *In re Stucley* (2), where it was decided that an unpaid vendor is entitled to all such remedies for enforcing payment of his purchase money as he would have been entitled to under an express mortgage or charge.

[LAWRENCE J. referred to the definition of " mortgage " in Wharton's Law Lexicon, p. 517.]

Under s. 2, sub-s. vi., of the Conveyancing Act, 1881, " mortgage " includes any charge on any property for securing money: and for the purposes of Locke King's Act, 1854, a " mortgage " extends to a lien for unpaid purchase money upon any hereditaments purchased by a testator: see Real Estate Charges Act, 1867, s. 2. And the will contains some context, consisting of a power for the trustees to borrow

(1) (1864) 10 H. L. C. 672, 683. (2) [1906] 1 Ch. 67, 79.

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money on " mortgage " and to invest trust moneys upon " mortgage," which would justify placing such an extended construction on the word " mortgage " in the expression in question as to include a vendor's lien, as the " mortgage " referred to in the powers would include an equitable mortgage. Further, the testator confirmed his will by a codicil executed after the mortgage on his freehold estate had been paid off and after the vendor's lien for their unpaid purchase moneys had arisen ; so that at the testator's death there were only these balances of unpaid purchase moneys in respect of which the direction in the will could have any operation.

L. W. Byrne for the residuary legatees. The unpaid balances are not payable out of the testator's residuary estate. The lien is not in respect of " sums of money secured on mortgage." A mortgage is a conditional conveyance : Co. Litt., vol. ii., p. 205 (*a*), s. 332. In *Santley* v. *Wilde* (1) Lindley M.R. in stating the principle of the rule against clogging the equity of redemption, said, " A mortgage is a conveyance of land . . . . as a security for the payment of a debt. . . . . This is the idea of a mortgage : and the security is redeemable on the payment or discharge of such debt or obligation, any provision to the contrary notwithstanding." And in *Noakes & Co.* v. *Rice* (2) that exposition of the principle was adopted by Lord Halsbury. There is no definition of a " mortgage " in Locke King's Act, 1854. But it is significant that it seems to have been considered by the Legislature necessary to enact by s. 2 of the Real Estate Charges Act, 1867, that in the construction of Locke King's Act, 1854, and of the explanatory Act of 1867, the term " mortgage " is to be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator. The Act of 1854 related to " mortgages " and not to " incumbrances " generally : *Barnwell* v. *Iremonger*. (3) Stirling L.J. in *In re Stucley* (4), when referring to what Lord Cranworth said in *Rose* v. *Watson* (5) that " the right or interest acquired under

(1) [1899] 2 Ch. 474.
(2) [1902] A. C. 24, 28.
(3) (1860) 1 Dr. & Sm. 242, 260.
(4) [1906] 1 Ch. 80.
(5) 10 H. L. C. 672.

the lien is the same as if a mortgage had been executed for the amount unpaid," did not intend to say that a lien and a mortgage were the same thing. The powers given by the will to the trustees, so far from having the effect, as has been contended, of giving the word " mortgage " a more extended meaning, have the opposite effect and confine that term within its stricter meaning.

Cur. adv. vult.

Oct. 22. LAWRENCE J. [after stating the facts and the question raised by the summons :] The solution of this question depends entirely upon whether the direction in the testator's will to pay and discharge any sums of money secured on mortgage of any of his freehold and leasehold properties out of the proceeds of sale and conversion of his residuary estate amounts to the signification of a contrary intention so as to exclude the operation of Locke King's Act, which by virtue of s. 2 of the Real Estate Charges Act, 1867, extends to a vendor's lien for unpaid purchase money.

Mr. Robertson strenuously contended that, because the right or interest acquired by a vendor under a vendor's lien is to all intents and purposes the same as if a mortgage had been executed for the unpaid purchase money : see *In re Stucley* (1), therefore the unpaid balances of the purchase moneys in the present case were " sums of money secured on mortgage " within the true meaning of that expression in the testator's will.

In my judgment, this contention cannot be supported. In the first place I am of opinion that, apart from any special context, the expression, " sums of money secured on mortgage," according to its ordinary and natural meaning, does not include unpaid purchase money in respect of which the vendor has a lien on the property comprised in the contract for sale. There is, in my opinion, an essential distinction between a mortgage and a vendor's lien : the former is a security upon real or personal property for the payment of a debt, or for the performance of an engagement, created by

(1) [1906] 1 Ch. 67.

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contract between the parties; whereas the latter is a charge arising by operation of law. No doubt a vendor's lien is incident to a contract between the parties, but the contract to which it is incident is not a contract constituting the relationship of mortgagor and mortgagee, but a contract constituting the relationship of vendor and purchaser: see Coote on Mortgages, 8th ed., p. 6, and Fisher on Mortgages, 6th ed., paras. 2, 5.

Although the various definitions of the word "mortgage" to be found in the law dictionaries and older text-books may be useful in ascertaining the derivation of that word and in arriving at its strict technical meaning, yet, I am of opinion that at the present day that word, when used in a recent instrument, such as the will in the present case, cannot properly be confined to a security strictly complying with such definitions.

In my opinion, a mortgage, in the modern acceptation of the term, has a wider meaning, and covers not only legal mortgages but also equitable mortgages of all kinds, that is to say, all charges created by contract to secure debts or engagements, even although not evidenced by deed or even by writing, as, e.g., a charge created by deposit of title deeds. For this reason I think that too much weight ought not, perhaps, to be attached to the opinion expressed by Kindersley V.-C. in the year 1860 in the case of *Barnwell* v. *Iremonger* (1), that the word "mortgage" in Locke King's Act did not include incumbrances generally and therefore did not cover a vendor's lien. Nevertheless, whilst fully recognizing that the word "mortgage" has in modern times received a wider meaning than was formerly given to it, I am clearly of opinion that even according to its extended meaning it does not include a vendor's lien and that unpaid purchase money owing to a vendor cannot properly be called money secured to him on mortgage. The fact that in certain Acts of Parliament, as, e.g., in the Real Estate Charges Act, 1867, and in the Conveyancing Act, 1881, it is enacted that, in the construction of those Acts, the word "mortgage" should be deemed to extend

(1) 1 Dr. & Sm. 242, 260.

to or include a vendor's lien for unpaid purchase money, although relied upon by Mr. Robertson, seems to me to tell against rather than in favour of his contention, as it is at least open to the comment that if a mortgage had included a vendor's lien there would have been no necessity for those enactments. In any event, those enactments do not purport to affect the construction of any instrument other than the Acts in which they are to be found.

The fact that an unpaid vendor by virtue of his lien has the same remedies for enforcing payment of his purchase money as he would have had, if a mortgage had been executed in his favour, does not, in my opinion, convert a vendor's lien into a mortgage nor the unpaid purchase money into a sum of money secured on mortgage.

The next point to be considered is whether there is any special context to be found in the testator's will, which would enable the Court to hold that the testator had used the expression " any sums of money secured on mortgage " in any other than its ordinary meaning. I have been unable to find any such context. There is nothing in any of the other parts of the will which has any bearing on the true meaning of the expression in question, and in the only other places in the will where the word " mortgage " occurs (that is, in the power given to the trustees to borrow money on mortgage and in the power given to the trustees to invest the trust moneys upon mortgage of real or leasehold property) it is used in its ordinary sense.

It was suggested by Mr. Robertson that the confirmation of the testator's will contained in the fourth codicil, which was executed after the mortgage had been paid off and after the vendor's lien had arisen, showed that the testator intended that the expression " any sums of money secured on mortgage " should apply to the unpaid balances of the purchase moneys. In my opinion, the confirmation of the will by the codicil had no such effect. The direction in the will was no doubt inserted because of the moneys, which at that date were secured on mortgage and was intended to apply to those moneys and to any other moneys which might at his death be so secured : in

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my opinion, the codicil was not intended to alter or extend the construction of the will in this respect, nor did it in fact do so.

From the devisees' point of view it was no doubt most unfortunate that the testator died before having completed the purchases, but this fact does not entitle the Court to strain the language of the will beyond its proper meaning.

On the whole, for the reasons stated, I have come to the conclusion that the unpaid balances of the purchase moneys were not " sums of money secured on mortgage " within the meaning of that expression in the testator's will, and consequently, that the devisees are not entitled to have such balances discharged or satisfied out of the testator's residuary estate.

Solicitors for the plaintiff and the defendants, the residuary legatees : *Smith, Rundell, Dods & Bockett.*

Solicitors for the other defendant : *Smith, Rundell, Dods & Bockett, for H. E. Trangmar, Hove.*

H. C. H.

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In re NATIONAL UNION OF SHIPS' STEWARDS, COOKS, BUTCHERS AND BAKERS.

[1924. N. 729.]

Trade Union—Registration—Proposed Trade Union—Application to register —Condition Precedent to Registration—Trade Union Regulations—Trade Union Act, 1871 (34 *&* 35 *Vict. c.* 31), *ss.* 6, 13—*Trade Union Act,* 1913 (2 *&* 3 *Geo.* 5, *c.* 30), *s.* 2, *sub-ss.* 1, 4.

For a trade union to be capable of registration under the Trade Union Acts, 1871 to 1913, it must have come into existence before the date of the application for registration and not be merely a proposed trade union at that date.

When therefore two applications were made for registration of trade unions under the same name and it appeared that the application made first in time related only to a proposed and not an existing union, an order was made for registration in respect of the later application, which had reference to an existing union, the name being modified so as to prevent confusion with a union of the same name that had only ceased to exist some two years before.

ORIGINATING MOTION.

Before February, 1922, seven persons who were the appellants on this motion were officials of a trade union called the National Union of Ships' Stewards, Cooks, Butchers and Bakers, and on February 1, 1922, that union amalgamated with another trade union called the British Seafarers' Union to form an amalgamated union called the Amalgamated Marine Workers' Union. They continued for a time to act as officials of the Amalgamated Union, but during the month of April, 1922, they were dismissed and expelled from the Amalgamated Union in circumstances which led to litigation not material for the purpose of this report.

In the early part of 1924 these men set about forming a new union to which they gave the old name of the National Union of Ships' Stewards, Cooks, Butchers and Bakers, and on April 23, 1924, they applied for the registration of the new union to the Registrar of Friendly Societies. They were then informed by the Registrar in a letter dated April 30, 1924, that there was already at his office an application for the registration of another union under the same name, which had been made by seven men, who were now respondents to this motion, and that unless the applicants took appropriate legal proceedings he would register the combination in respect of which these respondents had made application.

In these circumstances the seven appellants and their trade union took out this originating motion by way of appeal from the Registrar's decision, to which the seven sponsors of the other trade union and that union were made respondents. They asked that notwithstanding the decision of the Registrar refusing to register the appellant union he might be directed not to register the combination for which the respondents had made application for registration on the grounds that it was not a bona fide trade union but a combination formed solely for the purpose of interfering with the registration of the appellant union, and that the appellant union was a bona fide trade union entitled to the use of the name and entitled to registration thereunder.

In view of the nature of the issue raised Tomlin J. directed

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that the case ought not to be dealt with on affidavit evidence only, and at the hearing the appellant Hales and the respondent Wade were called. After hearing the evidence, the effect of which appears from the judgment, he came to the conclusion that there was no ground for the allegation of want of bona fides.

The question was then argued whether on the evidence the respondent union was an existing union at the date of the application to register it, and if not, whether it was capable of registration under the Trade Union Acts.

Roxburgh for the appellants. This appeal is brought under s. 2, sub-s. 4, of the Trade Union Act, 1913. The appellant union came into existence early in March, 1924, and the application for its registration under s. 6 of the Trade Union Act, 1871, was therefore in order. The provisions applicable to the registration of a trade union appear in s. 13 of the Act and regulations 2 and 3 of the regulations made under s. 13, sub-s. 6. The evidence shows, however, that at the date of the application to register the respondent union, it was non-existent and that it still remains so. A union must have been established before the application for registration can validly be made, seeing that under s. 6 of the Act of 1871 the application must be made by seven "members" of the union. The position of trade unions differs from that of limited companies, and there may be unregistered trade unions: see s. 2, sub-s. 1, of the Act of 1913. Further, in order to become a member of a trade union, the rules of the trade union must be complied with, and under the rules adopted for the proposed respondent union at a meeting of the respondents—they were in fact the rules of the old National Union—an entrance fee must be paid in order to become a member: compare *Luby* v. *Warwickshire Miners' Association.* (1) None of the respondents had done this, so that they could not be members of the union capable of applying for registration. Indeed Wade's evidence shows clearly that the respondents never got any further than to plan to form

(1) [1912] 2 Ch. 371, 378.

a union. The only valid application for registration in the name of the National Union before the Registrar was that of the appellants, and they are entitled to have their union registered.

[TOMLIN J. There seems to me to be some objection to registering a new union under the name of the old union that only ceased to exist in 1922. Would the appellants be content with registration with an addition to the name of the year of registration ?]

The appellants would be quite content with that.

Plummer for the respondents. It is not essential that a trade union should be in existence before the date of the application to register it. The word "members" in s. 6 of the Trade Union Act, 1871, means, it is suggested, "intending members." This view is supported by the note to the form of application subjoined to the regulations, which states that it will only be necessary for the applicants for registration to say that they are authorized by the union to apply "where the trade union has been in operation before the date of the application."

In any case the respondent union was here sufficiently established to enable an application for registration to be made. Certain persons had assembled together and decided to form a union, and this was sufficient to do so, just as in the case of a club. All that was required to entitle the respondents to apply for registration was that the union should have been established, and all that was necessary for that purpose was that a body of persons should meet and decide to form a union of which they were the members. The persons attending the meeting of March 1, 1924, and the subsequent meeting had shown their intention to subscribe to the union, and that was sufficient to make them "members" of the union.

TOMLIN J. This is an appeal under s. 2, sub-s. 4, of the Trade Union Act, 1913, from a refusal by the Registrar to register an alleged trade union called the National Union of Ships' Stewards, Cooks, Butchers and Bakers. The refusal is based on the existence of a prior application to register

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another alleged union by the same name. The appellants are the former of these two alleged unions and the seven applicants for its registration, and the respondents are the latter of the two alleged unions and the seven applicants for its registration.

The material sections of the relevant statutes are as follows: By s. 6 of the Trade Union Act, 1871, it is enacted that "any seven or more members of a trade union may by subscribing their names to the rules of the union, and otherwise complying with the provisions of this Act with respect to registry, register such trade union under this Act, provided that if any one of the purposes of such trade union be unlawful such registration shall be void." By s. 13 of the same Act it is provided, so far as the same is material, that "with respect to the registry, under this Act, of a trade union, and of the rules thereof, the following provisions shall have effect:—

"(1.) An application to register the trade union and printed copies of the rules, together with a list of the titles and names of the officers, shall be sent to the Registrar under this Act.

"(2.) The Registrar upon being satisfied that the trade union has complied with the regulations respecting registry in force under this Act, shall register such trade union and such rules.

"(3.) No trade union shall be registered under a name identical with that by which any other existing trade union has been registered, or so nearly resembling such name as to be likely to deceive the members or the public."

It will be observed that a trade union is not to be registered under a name identical with that of any existing trade union, and it is material also to notice the provisions of sub-s. 4 relating to the case where a trade union applying for registration "has been in operation for more than a year before the date of such application." Sub-s. 6 provides for the making of regulations respecting registration, and these have in fact been made. Reg. 2 provides: "The Registrar shall not register a trade union under a name identical with that of any other existing trade union known to him, whether registered or not registered, or so nearly resembling such name as to be likely to deceive the members or the public."

This prohibition goes therefore beyond the prohibition in s. 13, sub-s. 3. Reg. 3 provides that "upon an application for the registration of a trade union which is already in operation, the Registrar, if he has reason to believe that the applicants have not been duly authorised by such trade union to make the same, may, for the purpose of ascertaining the fact, require from the applicants such evidence as may seem to him necessary." The application for registration is by reg. 4 to be made on Form A subjoined to the regulations, and cl. 4 of the form is as follows: "The [name of trade union] was established on the day of "; and cl. 14 contains a statement by those who make the application: "We have been duly authorised by the trade union to make this application on its behalf, such authorisation consisting of ." There is, however, a note appended to this clause: "This will only be necessary where the trade union has been in operation before the date of the application."

The only other material provision is s. 2 of the Trade Union Act, 1913. In sub-s. 1 there is this definition of a trade union: "The expression 'trade union' for the purpose of the Trade Union Acts, 1871 to 1906, and this Act, means any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects: Provided that any combination which is for the time being registered as a trade union shall be deemed to be a trade union as defined by this Act so long as it continues to be so registered."

The short history of the facts in this case is as follows: Prior to February, 1922, there were two trade unions in existence, first a union of the name now sought to be registered, the National Union of Ships' Stewards, Cooks, Butchers and Bakers, and secondly the British Seafarers' Union. In February, 1922, these two unions amalgamated under the name of the Amalgamated Marine Workers' Union. Since February, 1922, therefore, up to the early part of this year there has been only the one Amalgamated Union.

The appellants, the sponsors of the appellant union, were officials of the old National Union, and upon the amalgamation

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taking place they became officials of the Amalgamated Union. At some date before the early part of this year they were dismissed and expelled from the Amalgamated Union, and litigation ensued. I understand that in that litigation the appellants had a measure of success, and were held to have been wrongfully dismissed. That did not, however, necessarily involve their reinstatement, and since their dismissal they have in fact remained unconnected with the Amalgamated Union. In the early part of this year they found, or were able to create, among members of the Amalgamated Union a measure of dissatisfaction with it, and they induced some of these men to join with them in forming a new union for those who came within the class of seafaring men connected with the catering department, with the result that early in March they formed a new union to which they gave the old name of the National Union of Ships' Stewards, Cooks, Butchers and Bakers.

Something has been said in the course of the cross-examination of Mr. Hales, one of the appellants, as to the methods adopted by himself and his co-appellants ; and it was admitted by him that for some time after their expulsion from the Amalgamated Union, until, indeed, they formed the new union, they had been living upon public relief. Matters of this kind seem to me to be entirely irrelevant for the purpose of any matter I have to determine on this appeal. So far as the appellants are concerned the only thing I have to determine is whether they have formed a union which they are in a position to register. I am not concerned with trade union politics, or how far it is in the public interest that bodies of this kind should be formed by irresponsible persons, or with the wisdom of those that join them. I am, however, satisfied that this union was formed in the early part of this year, and, if an exact date must be fixed for its birth, I should assign March 3. I am satisfied after seeing its books that the union was formed about this time, and that by the end of March about 200 members had been enrolled in the new union and had paid entrance fees and subscriptions.

In these circumstances an application was made by this union early in April for its registration under the name of the

old National Union; and the applicants then for the first time learned that there was already pending before the Registrar an application by the respondents for the registration of another alleged trade union under the same name. That previous application having been made to the Registrar, he informed the applicants that unless steps were taken by them to have the matter dealt with by this Court, he would grant registration in respect of the union on whose behalf the first in date of the two applications had been made.

In these circumstances this original motion was launched. When it came before me in the first instance my attention was drawn to the fact that the appellants were charging the respondents with a want of bona fides in applying to register a non-existent trade union, and, on understanding this, I directed that the matter should come before me at a later date, and that I should be given an opportunity of seeing witnesses for either side in the box. This has now been done, and I have now heard the evidence of Mr. Hales on behalf of the appellants and of Mr. Wade on behalf of the respondents.

The facts with regard to the respondents' so-called trade union are as follows: Its sponsors are seven men who followed the seafaring walk of life in connection with the catering department. They are men who, with others of the same class, have, for reasons that may be good or bad, felt dissatisfied with the activities of the Amalgamated Union; and it seems to have occurred to them that it would be a good thing to reconstitute a trade union for their own particular department. Accordingly on March 1, 1924, they met at the house of one of their number, and I have had produced to me a minute of that meeting described as a meeting of seamen from the catering department of ships. It was held at the house of Mr. Skinner, who was one of this group of seamen, and after a discussion they made up their minds to form a new trade union to be called the National Union of Ships' Stewards, Cooks, Butchers and Bakers. On a subsequent date the same men met again at 4 Terrace Pier, Gravesend, and they then agreed that an application should be made for the registration of the new union and that some of the persons

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present should sign a copy of rules for the new union which consisted of the rules of the old National Union. Skinner undertook to see to everything in connection with the application for registration and to find the money to pay for any fee required upon the registration of the union.

Now No. 4 Terrace Pier is a cabin, hut or shelter standing on the pier at Gravesend, the approach to which is through the toll-gate on the pier. It was really used as a shelter for watermen and others going about their lawful occasions on the pier. It seems in the past to have been used sometimes by trade unions connected with seafaring men for the purpose of collecting subscriptions from members. It was no doubt a convenient place to intercept the seamen coming ashore before they had reached a place where there were opportunities of disposing of any pay in their pockets.

As a result of this meeting an application was put in to register the proposed union, the registered address of the union being given as No. 4 Terrace Pier, Gravesend.

I wish to say at once that I believe the respondents were acting bona fide and honestly throughout. I think they knew nothing of the appellants' union and bona fide wished to found one for themselves. There is, in my opinion, no ground for charging them with want of bona fides. If they fail in this case, it will only be because they have not complied with the statutory requirements, and there is, in my view, no ground for the charges of conspiracy that have been made. Wade gave his evidence very fairly, and he said that the respondents did not found a trade union, but that they intended to do so when they had got the proposed union registered. They enrolled no members and took no money. Wade said in terms that the union was not formed, because they wanted to get registered before they took members.

Those being the facts, the question arises whether, on the true construction of the Act, it is possible to register a prospective trade union or only a trade union already in existence. If it is possible to register a prospective trade union, there is no reason why the respondents should not be registered; but if it is only an existing trade union that can be registered,

then the only valid application for registration is that of the present appellants.

When I come to examine the language of the material Acts, I find some difficulty in saying what it is that is a condition precedent to the existence of a trade union, or in other words, what it is that brings a trade union into existence, inasmuch as the definition of a trade union in s. 2, sub-s. 1, of the Trade Union Act, 1913, merely states that it means " any combination, whether temporary or permanent, the principal objects of which are under its constitution statutory objects." Therefore it seems to me that it must be a question of fact on the particular circumstances of each case whether a trade union has come into existence. In the present case I find that the applicant union came into existence in March, 1924, and that the respondent union has never yet come into existence, and it remains for me to say whether under ss. 6 and 13 of the Trade Union Act, 1871, there was any power to register a non-existent trade union.

I come to the conclusion on these sections that that union only can be registered which is in existence. Sect. 6 requires an application by " any seven or more members of a trade union " and not by seven or more persons proposing to become members of a trade union ; and in providing that they must have subscribed " their names to the rules of the union " it seems to predicate the existence of a trade union possessing rules. And although there are phrases in some of the sections of the Act and in the regulations which seem to suggest the possibility of registering a prospective trade union, I do not think they are sufficient to establish anything contrary to what appears to me to be necessarily implied from s. 6 of the Act of 1871. I refer, for example, to cl. 14 of Form A and the note at the foot of it to the effect that it will only be necessary to fill in this clause " where the trade union has been in operation before the date of the application."

I doubt, first, whether I ought to allow myself to be guided by any such note in construing the section of the Act ; and, secondly, whether the words " in operation " do not mean something more than the initial activities necessary to form a

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trade union. It is to be observed that cl. 4 of the form requires a statement of the date upon which the trade union was "established."

Therefore upon the construction of ss. 6 and 13 of the Act I come to the conclusion that a trade union must be in existence before an attempt can successfully be made to register it. Having reached that conclusion, I think it follows that the appellants are entitled to have their union registered. But I have already pointed out that there may well be an objection to registering to-day a trade union in the same name as a trade union which ceased to exist in 1922; and I asked whether the applicants would be content to have their union registered with some indication of the date of its origin in the name, and they agreed to this.

Therefore I will direct the Registrar to register the appellant union in the name of the National Union (1924) of Ships' Stewards, Cooks, Butchers and Bakers, upon his being satisfied that the union has duly altered its name to that authorized to be registered.

Solicitors: *Vizard, Oldham, Crowder & Cash, for G. J. Lynskey & Son, Liverpool; White & Co.*

H. C. G.

EVE J.
1924
Oct. 18, 22.

In re SARSON.

PUBLIC TRUSTEE *v.* SARSON.

[1924. S. 1858.]

Will—Construction—Rent Charge and settled Legacies—Direction that "all legacies, devises, and bequests" should be Free of all Duties—Future Estate and Legacy Duty—Finance Act, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 14.

By his will made in 1910 a testator who died in 1913 after appointing executors and bequeathing certain legacies, settled a terminable rent charge of 120*l.* per annum for the residue of a term of 48½ years on his son S. and his son's widow successively for life, with remainder to the son's children. After a further bequest and a devise of freeholds the testator directed his executors, after payment of debts, etc., and the legacies thereinbefore given "and duties thereon," to transfer his residuary estate to the Public Trustee to be held upon trust for conversion and investment, the resultant investments being called "the residuary trust funds." Upon the death of the testator's widow, to whom a trust annuity of 800*l.* was given, these trust funds and all accumulated income were to be applied in paying numerous pecuniary legacies, and two settled legacies of 2000*l.* each. One of these was given upon trust to pay the income to a daughter of the testator for life, and after her death for her husband and children. The other was given in trust to pay the income to S. for life and after his death to his widow for life, and subject thereto upon trust for the children of S. Subject to the payment of the various legacies made payable after the death of the widow the testator declared that the trustee should stand possessed of the residuary trust funds upon trust for his children in equal shares. The testator then directed that all legacies, devises, and bequests should be free of all duties, and that all estate, settlement, succession, legacy and other duties in respect of any of his property (real or personal) should be paid out of his residuary estate. The testator's widow died on November 20, 1923. Questions having arisen as to the incidence of the estate and legacy duties, the Public Trustee took out a summons to have it determined (1.) whether, having regard to the above direction, the future estate duty (if any) payable in respect of the rent charge of 120*l.* and the two settled legacies of 2000*l.* each should be payable out of the residuary estate, or out of the properties the subject of the gifts. (2.) How any legacy duty which might thereafter become payable in respect of these dispositions should be borne:—

Held, (1.) That the only estate duty payable out of residue in respect of the 120*l.* rent charge and the two settled legacies of 2000*l.* was that properly payable on and in consequence of the testator's death; and any future estate duty must be paid out of the property the subject of these gifts respectively.

Held, further, on the true construction of the will, that the direction as to the payment of all legacies, etc., free of all duties could not be

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construed as giving to the postponed legatees any wider relief than was given to those who took legacies on the testator's death.

(2.) That any legacy duty which might thereafter become payable in respect of these gifts was payable out of the testator's residuary estate. There would be liberty to apply as to the provision to be made in respect of any such duty.

BY his will dated October 11, 1910, Henry Sarson, after appointing executors and giving certain specific and pecuniary legacies, gave all his interest in the annual sum or rent charge of 120*l.* for the term of 48½ years from March 25, 1896 (charged upon and payable out of certain leasehold premises at Hoxton in Middlesex), to his son, Sidney Scott Sarson, for the residue of the said term if he should so long live, and after his death to the defendant, Charlotte M. Sarson, wife of S. S. Sarson, for the residue of the said term, if she should so long live, and after her death or remarriage the testator gave the same to the trustee of his will, during the residue of the term, upon trust for sale and conversion and to hold the rent charge or the proceeds thereof upon trust for the children of S. S. Sarson living at the death of the survivor of the testator and S. S. Sarson, and attaining twenty-one, in equal shares as tenants in common. The testator then gave another legacy and devised certain freehold interests, and directed that as to the residue and remainder of his property, estate, and effects both real and personal his executors should, subject to and after payment of his debts, funeral expenses, and the legacies thereinbefore given "and duties thereon," transfer the same to or vest it in the Public Trustee, to whom he bequeathed the same, upon trust for sale, conversion, and investment and to hold the "residuary trust funds" upon the trusts therein mentioned. These trusts included the payment of an annuity of 800*l.* to his wife, Emily Sarson, for life, and subject thereto the income of the residuary trust funds was to be accumulated for twenty-one years, and after the death of his wife the trustee was to pay a large number of pecuniary legacies out of the accumulated income of the residuary trust funds.

Among these legacies there was (1.) a sum of 2000*l.* to be held in trust for the testator's daughter, Jenny Histed, for

life as her separate estate, and after her death to be equally divided between such of them her husband John Histed and her children as might be living at the death of the survivor of the testator and her husband, sons at twenty-one or daughters at that age or marriage; and (2.) another sum of 2000*l.* to be held in trust for the testator's son S. S. Sarson for life, and after his death to pay the income to his wife the defendant C. M. Sarson for her life, and after her death or remarriage upon trust for such of the children of S. S. Sarson as might be living at the death of the survivor of the testator and S. S. Sarson and attain twenty-one. Subject to these payments the Trustee was to stand possessed of the residuary trust funds upon trust to pay 1000*l.* to Henry Logsdail Sarson a son of the testator, absolutely, and subject thereto upon trust for the testator's children as therein mentioned. The testator then directed that "all legacies, devises, and bequests shall be free of all duties, and that all estate, settlement, succession, legacy and other duties, in respect of any of my property (real or personal) including the duty if any on any gifts made by me in my life shall be paid out of my residuary estate." The testator died on September 19, 1913, and his will was proved on November 10, 1913. The gross value of the estate was sworn at 19,894*l.* 10*s.* 3*d.* The executors paid the various legacies payable on the death of the testator and assented to the specific devise and bequests in the will and out of the residue paid the duties then payable in respect of the rent charge and life interests. In December, 1914, all the residuary estate and the investments representing the same were vested in the Public Trustee pursuant to the direction in the will. Emily Sarson died on November 20, 1923. The residuary estate then amounted to about 21,000*l.* The question having arisen how the future estate and legacy duties should be borne, the Public Trustee took out an originating summons asking:—

(1.) Whether, having regard to the direction in the will that all legacies and bequests should be free of all duties, which were to be paid out of the residuary estate;

(*a*) the future estate duty payable in respect of the rent

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charge of 120*l.* was payable out of residue, or out of the property the subject of the gift.

(*b*) and (*c*). The like as to the two legacies of 2000*l.* each.

(2.) The like question as to any legacy duty which might hereafter become payable in respect of these dispositions.

(3.) Directions as to what provision should be made out of the residuary estate for the payment of any future estate duty or legacy duty.

Errington for the Public Trustee.

Stafford Crossman for the first defendant, a tenant for life.

The cases on the question of the construction of directions in a will as to bequests and legacies being free of all duties are somewhat conflicting. The first defendant is interested, as tenant for life, in the rent charge of 120*l.* and also in one of the settled legacies of 2000*l.* The words of the direction in the will dealing with the ultimate residue are very wide, "all legacies devises and bequests" and the other duties mentioned on "any of my property."

[EVE J. It is not unlike the bequest in *In re Beecham.*(1)]

The cases in favour of my contention, that all future estate duties should be paid out of residue, are *In re Stoddart* (2); *In re Tinkler* (3); *In re Eve* (4); and *In re Parker.* (5) The words of the direction in this last case are very like those in the present. The later cases are, I submit, distinguishable. In them the principle is followed that the person claiming that future duties should be payable out of residue must make out his case from the clearly expressed intention of the testator: *In re Wedgwood.* (6) The words of the direction in *In re Beecham* (1) were not so wide as in the present case. The future duties are payable out of residue.

Rand, for a remainderman entitled under one of the settled legacies. The cases cited on behalf of the tenant for life may be explained on the ground that the testator had expressed his intention that the legacies should be given nett. I submit

(1) (1923) 130 L. T. 558.
(2) [1916] 2 Ch. 444.
(3) [1917] 1 Ch. 242.
(4) [1917] 1 Ch. 562.
(5) (1917) 117 L. T. 422.
(6) [1921] 1 Ch. 601.

that here the future estate duties should be borne by the respective properties: *In re Hatch* (1); *In re Kennedy* (2); and *In re Duke of Sutherland.* (3)

Roger Turnbull for another beneficiary with a similar interest. The difference between legacy duty and estate duty is now clearly settled in construing directions of this character. *In re Wedgwood* (4) governs the present case. Under the first direction as to the payment of duties in the present will, the residue of the estate, after the payments there mentioned, was to be applied in payment of the "duties thereon," so as to free the estate before it was handed over to the Public Trustee; and the subsequent fuller direction sweeps in the other legacies which are to be discharged from payment of duties in the same way, and to no greater extent. The future estate duty in respect of the rent charge and these subsequent legacies must come out of the respective funds.

[He was stopped by the Court.]

Stafford Crossman, in reply, mentioned *Dunn's Trustees* v. *Dunn* (5), where all the chief cases on this point were referred to.

EVE J. This is another addition to the already lengthy chain of cases involving the question of what limit, if any, is to be imposed on a direction contained in a will that "all legacies devises and bequests shall be free of all duties and that all estate, settlement, succession, legacy, and other duties payable in respect of any of the testator's property" should be paid out of his residuary estate. So far as concerns the legacy duties it may be taken as established that under such a direction the whole of these duties fall to be discharged out of the residue, and question two of the summons must be answered accordingly.

The substantial difficulty arises over the estate duty; is the duty directed to be paid out of the residue restricted to the amount payable on the passing of the testator, or does the

(1) (1916) 86 L. J. (Ch.) 454; [1916] W. N. 240.
(2) [1917] 1 Ch. 9.
(3) [1922] 2 Ch. 782.
(4) [1921] 1 Ch. 601.
(5) 1924 S. L. T. 479.

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direction extend to cover the duty payable on the determination of each of the limited interests created by the testator's will in various parts of his property? Prima facie the testator is to be assumed to have intended to limit his benevolence in this direction to the estate duty payable on his own decease. The contrary intention involves a vista of difficulties into which no testator ought to be presumed to have plunged his residuary legatees and his legal personal representatives unless he has clearly demonstrated his determination so to do. The application of this rule has been considered in a number of recently reported cases, wherein I am fain to confess the language employed by the testator would, but for the existence of the rule, appear to be at least as capable of the wider as of the more restricted meaning. And indeed, in some of the earlier cases decided before the rule was enunciated in *In re Wedgwood* (1), conclusions were reached which it is not easy to reconcile with some of the more recent pronouncements. Compare, for example, the decisions in *In re Hatch* (2); *In re Parker* (3); and *In re Eve* (4), with those in *In re Wedgwood* (1); *In re Duke of Sutherland* (5); and *In re Beecham.* (6)

In these somewhat embarrassing circumstances I address myself to the will which I am called upon to construe. It is dated October 11, 1910, and its author died on September 19, 1913. After appointing executors and bequeathing certain specific and pecuniary legacies the testator settled a terminable rent charge of 120*l.* per annum, payable for the residue of a term of 48½ years from March, 1896, on his son Sidney and his widow successively for life with remainder to such of the children of his said son as should be living at the death of the survivor of him (the testator) and his son and should attain twenty-one. Then after a further pecuniary bequest and a devise of freeholds he directed his executors, subject to and after payment of debts, funeral and testamentary expenses and legacies thereinbefore given "and duties thereon," to transfer

(1)]1921] 1 Ch. 601.
(2) 86 L. J. (Ch.) 454.
(3) 117 L. T. 422.
(4) [1917] 1 Ch. 562.
(5) [1922] 2 Ch. 782.
(6) 130 L. T. 558.

his residuary estate—real and personal—to, or vest it in the Public Trustee, to whom he thereby gave devised and bequeathed the same upon the trusts thereinafter mentioned. Pausing there, it is, I think, obvious the testator contemplated that before the residue was vested in the Public Trustee it should be cleared of all payments proper to be made by the executors, including the duties on the legacies thereinbefore given, amongst which were the successive interests in the rent charge. But the only duty on these interests, other than legacy duty, which the executors could so discharge, was the duty on the first life interest, and as I do not think that any directions contained elsewhere in the will affecting the residue after the vesting in the Public Trustee can be construed as imposing on the residue in his hands any further burden in respect of the bequests contained in the will prior to the residuary clause, I hold that in answer to question one the only estate duty payable out of residue in respect of the 120*l.* rent charge is that payable on the first life interest. Future estate duty (if any) must be paid out of the subject of the gift. Reverting now to the will, the residuary estate is to be held upon trust for conversion and investment in the usual way, the resultant investments being thereinafter called "the residuary trust funds." Then follow trusts of the income, including a trust for the accumulation of surplus income for a period of twenty-one years, should the testator's widow so long live. Upon the death of the widow the residuary trust funds and all accumulated income are to be applied in paying certain pecuniary legacies, and providing two settled legacies of 2000*l.* each. [His Lordship stated the trusts of these two legacies and continued:] Subject to the payment of the legacies thereinbefore bequeathed and made payable after the death of his widow, the testator declared that his trustee should stand possessed of the residuary trust funds upon trust for his children in equal shares. Such are the trusts of the funds described as "the residuary trust funds." Then after certain directions as to investment and advances made during his life, the testator says "I direct that all legacies devises and bequests shall be free of all duties, and that all estate settlement

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succession legacy and other duties in respect of any of my property (real or personal) including the duty on any gifts made by me in my life shall be paid out of my residuary estate."

Does that direction impose on residue the burden of discharging the future estate duties in the settled legacies or is the imposition restricted, as it is in the case of the bequests made prior to the transfer of residue to the Public Trustee, to the duty payable at testator's death ? It is to be observed that the direction does not impose any burden on the residuary trust funds—the payments fall on the residue—that is upon the estate prior to its transfer to the Public Trustee. This, I think, demonstrates that the real intent and the true effect of the direction was to give legatees, whose legacies were postponed till after the widow's death, the same relief as had been given to these who took legacies immediately on testator's death. The direction cannot, in my opinion, be construed as giving the postponed legatees any wider relief—if it were so construed it would defeat the testator's obvious intention that the residue should be cleared before transfer to the Public Trustee. Accordingly I hold that the duties payable out of residue are limited to the duties properly payable on and in consequence of the death of the testator. As it is uncertain whether any further legacy duty will become payable in respect of the rent charge there will be liberty to apply as to this.

Solicitors for all parties : *Waller, Neale & Houlston.*

G. M.

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[1924. B. 715.]

Nov. 6, 7, 11.

Vendor and Purchaser—Specific Performance—Particulars of Sale—Application for specific Performance of Contract held not to be the true Contract—Right to specific Performance of Contract as construed by the Court—Easement—Final Determination of Nature and Extent.

At a sale by auction the defendant agreed to purchase lot 10, a building divided into two parts by an internal wall. The two parts were let on lease. In respect of one part there was a right of way over Newman Yard, and in respect of the other part a right of way over Perry's Place.

By the particulars of sale the purchaser of lot 10 was given a right of way over Newman Yard and Perry's Place. The conditions of sale provided that in case of any difference as to the nature and extent of an easement granted to the purchaser of a lot the decision of the vendor's solicitor should be final. The plaintiff offered to grant the defendant rights of way over Newman Yard and Perry's Place "as the same now are or can be enjoyed," and his solicitors decided that the conveyance must contain that restriction. The defendant, claiming that he was entitled to rights of way over Newman Yard and Perry's Place in respect of the whole of lot 10, refused to complete, and the plaintiff brought an action for specific performance. At the trial the Court held that the contention of the defendant was right. The plaintiff then claimed that he was entitled to specific performance of the contract as construed by the Court:—

Held, that the plaintiff had not been ready and willing at all times to carry out the contract, but only a contract as construed by himself, and that the conditions of sale did not entitle his solicitors to decide that the easements should appertain to part only of the lot, for to do so would be to determine, not the nature and extent of the easements, but the parcels of the dominant tenement which had already been fixed by the contract.

THIS was an action brought by a vendor for specific performance by the defendant of his contract to purchase from the vendor certain property. The plaintiff was the owner in fee simple of various freehold properties round about Oxford Street, Newman Street and Goodge Street, which he put up for sale by auction in July, 1923, subject to the leases still current. The defendant purchased lot 10. It had no frontage to Oxford Street or Newman Street, and access to it was given by two passages, one leading out of Oxford Street, known as Perry's Place, and the other out of Newman

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Street, known as Newman Yard. Lot 10 was let on lease to a bank. Physically it consisted of two buildings, separated by an internal wall, which divided the part looking on to Newman Yard from the part looking on to Perry's Place. The soil of Perry's Place was included in the sale of lot 1, and the soil of Newman Yard in lot 9.

The particulars of sale stated: "The purchasers of lots 1, 3, and 10 will be granted an easement of a perpetual right of way over the roadway leading from Oxford Street to Perry's Place, subject to similar obligations to those which are set out in the leases under which the premises comprised in those lots are now held." (It was admitted that "over the roadway leading from Oxford Street to Perry's Place" meant the whole of the land, coloured brown on the sale plan, leading from Oxford Street up to and including the rectangular part of Perry's Place.) "The purchasers of lots 4 to 11 inclusive will be granted an easement of a perpetual right of way into Newman Yard from Newman Street subject to similar obligations to contribute to the repair of the gateway, passage and yard to those contained in the leases under which the premises comprised in those lots are now held."

The title to lot 10 was accepted by the defendant, but he could not agree with the plaintiff as to the words to be used in the conveyance to him of the rights of way he was entitled to under his contract. The form proposed by the plaintiff was as follows: "Together also with a full right of way at all times for the purchaser his heirs and assigns and occupiers of the premises hereby assured his and their workmen servants and tenants in common with all other persons entitled thereto with or without horses carts or carriages to go pass and repass along over and upon the roadway from Oxford Street coloured brown on the said plan and the gateway and roadway leading from Newman Street coloured green on the said plan in perpetuity *as the same are now or can be used and enjoyed under or by virtue of the lease hereinafter referred to but not further or otherwise.*"

Condition 14 provided: "Where any lot appears by the particulars to be offered for sale subject to any easement or

right for the benefit of any other lot or lots the conveyance of both the servient and the dominant lot or lots shall be framed accordingly, and in cases of difference as to the nature and extent of any such easement or right or as to the form or mode of giving effect in the conveyance to any purchaser of any grant reservation or covenant the same shall be determined by the vendor's solicitors."

On December 20, 1923, the vendor's solicitors wrote to the defendant's solicitors: "We beg to inform you that in the exercise of our right under condition 14 we request that the grant of the right of way to your client be accepted in the form finally settled by us . . . . failing this we shall commence proceedings for specific performance of your client's contract."

The defendant refused to accept the grant of way in its restricted form, and the plaintiff commenced proceedings for specific performance of the contract.

Preston K.C. and *W. A. Peck* for the plaintiff. The plaintiff has not repudiated the contract. There can be no repudiation unless one party shows an intent no longer to be bound by the contract and the other party has accepted the repudiation as a ground for rescission: *Johnstone* v. *Milling* (1); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2); *Frost* v. *Knight.* (3) Here the plaintiff has always said and still says that he is willing to complete the contract. He is entitled to elect whether he will have his action dismissed or perform the terms of the contract as construed by the Court: *Preston* v. *Luck* (4); Fry on Specific Performance, § 767.

In the alternative the decision of the vendor's solicitors as to the form of the contract is final.

Bennett K.C. and *G. M. Simmonds* for the defendant. The plaintiff is not entitled to a decree unless he has always been ready and willing to perform the contract. The Court has now decided that the contract which the plaintiff was willing to perform was not the true contract: Fry on

(1) (1886) 16 Q. B. D. 460, 467.
(2) (1884) 9 App. Cas. 434, 438.
(3) (1872) L. R. 9 Ex. 111.
(4) (1884) 27 Ch. D. 497.

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Specific Performance, § 922. In the cases cited by the plaintiff the time for performance had not come.

RUSSELL J. The purchaser contends that he is entitled under his contract to a right of way over Newman Yard in respect of the whole of lot 10, and also to a right of way over Perry's Place in respect of the whole of lot 10. The plaintiff contends that the purchaser is only entitled to a right of way over Perry's Place in respect of the Perry's Place portion of lot 10, and to a right of way over Newman Yard in respect of the Newman Yard portion of the lot. It seems to me that all I have to decide is what was contracted to be given by the contract which the parties signed. Does the contract provide for a grant of two rights of way each appurtenant to the whole of lot 10, or for two rights of way, one of which is appurtenant to part of lot 10, and the other to the remainder of lot 10. The language of the contract is quite clear. The purchaser of lot 10 "will be granted an easement of a perpetual right of way over the roadway leading from Oxford Street to Perry's Place, subject to similar obligations to those which are set out in the leases under which the premises comprised in those lots are now held." It was argued that those words confine the right of a way to a right of way similar to that granted in the leases. In my opinion they have no such operation; they merely subject the right of way which is contracted to be given to obligations similar to those to which the right of way granted by the lease is subject—namely, the obligation to contribute a part of the cost of repairing the road. The relevant words, "the purchaser of lot 10 will be granted an easement of a perpetual right of way over the roadway leading from Oxford Street to Perry's Place," are clear and unambiguous, and show that the right of way there contracted to be given is one which is to be enjoyed by lot 10 and not merely by part of lot 10.

As to Newman Yard, "the purchasers of lots 4 to 11 will be granted an easement of a perpetual right of way into Newman Yard from Newman Street, subject to an obligation to contribute part of the cost of repairing the road." It is

equally clear that this right of way is to be enjoyed in respect of the whole of lot 10.

It was further urged that the contract must be construed in the light of the surrounding circumstances, that at the date of the contract lot 10 was in fact divided into two parts by an internal wall, and that the lessee had covenanted not to cut any internal wall without the consent of the lessor. It must be borne in mind that the purchaser of lot 10 would himself become the lessor and might consent to the physical separation being done away with, or he might acquire the lease and become the freeholder in possession and deal with his property as he liked. In my opinion the words of the contract are quite clear, and there is nothing in the so-called surrounding circumstances to justify me in altering the plain meaning of the language.

It is said, also, that a difference has arisen between the parties as to the extent of the right of way, and that the vendor's solicitors have decided that the grant of the right of way to the defendant must be in the form settled by them, and that such decision is final under condition 14.

Condition 14 assumes the dominant and servient tenements to have already been defined and fixed by the contract as lots. No doubt the condition enables the vendor's solicitors to say the right of way to lot 10 over Perry's Place shall be of a particular nature and extent, but it does not enable them to go beyond that and say that it shall appertain only to part of lot 10. To do so would be to determine, not the nature or extent of the easement, but the parcels of the dominant tenement. The contention of the plaintiff that the determination of his solicitors is final is not well founded.

The present position of the parties is a curious one. The action is one for specific performance not of the contract as now construed by the Court, but of a totally different contract. The action was based, and necessarily based, on the allegation that the plaintiff was at all times and is now willing to carry out the contract. That is quite true with regard to the contract as construed by the plaintiff, but quite untrue with regard to the contract as construed by the Court; for the

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present purpose I must assume the Court's construction to be correct. Mr. Preston says: "True it is that I have sought up to the present moment to force upon the defendant a contract which I am not entitled to force on him, and that I have resisted with all my power performing the contract which the defendant, and now the Court, say is the correct one; but still you must not dismiss my action for specific performance. I am entitled at the last moment to turn round and say: Having blown hot, I now blow cold. I now ask the Court to decree specific performance of the contract which the Court has determined to be the true contract." No authority has been cited to me in favour of that contention, and in the absence of any clear and binding authority it does not seem to me to be a reasonable position. The action will be dismissed with costs.

Solicitors: *Saxton & Morgan; Rivers & Milne.*

J. B. B. M.

TOMLIN J. 1924 *Oct.* 21.

In re NEVILLE.

NEVILLE *v.* FIRST GARDEN CITY, LIMITED.

[1924. N. 277.]

Will—Construction—"I forgive all debts owing to me"—Meaning of "debts."

A codicil to the will of a testator contained the following phrase: "I forgive all debts owing to me." There was no context in the codicil to affect the construction of these words, but by his will and codicil the testator, whose estate was valued at 52,000*l.* personalty and 10,000*l.* realty, had given pecuniary legacies amounting to nearly 22,000*l.* and made a residuary gift to the Skinners Company. The will conferred upon the trustees power to appropriate any part of the testator's estate "or the investments for the time representing the sum" in satisfaction of any legacy. The testator's personalty consisted to the extent of some 22,000*l.* of British and foreign Government securities, redeemable debenture and debenture stock in commercial companies, and of certain mortgages and charges and sums of loan stock. The estate also included certain loans to friends and past employees of the testator to start them in business, and these the executors had, with the consent of the residuary legatees, treated as released by the forgiveness of debts. This summons raised the question whether this forgiveness of debts operated as a

legacy to certain companies and societies of the mortgage debts owing by them on the security of the mortgages and charges and of the amounts secured by the loan stock. The mortgages and charges did not differ from ordinary mortgage securities, and the loan stock was of the nature of permanent debenture stock, being redeemable only in certain events :—

Held, having regard to the above circumstances, that the word "debts" must receive a narrower construction than the strict legal meaning of the word; that its use in connection with the expression "I forgive" introduced a personal note into the matter with which the testator was intending to deal; and therefore that the mortgage debts and sums of loan stock were not released.

ADJOURNED SUMMONS.

By his will dated August 16, 1921, Ralph Neville, after appointing executors and giving a large number of pecuniary legacies, devised and bequeathed all his interest in Banstead Place Estate in the county of Surrey and all his property not otherwise disposed of to the defendants, the Worshipful Company of Skinners, at the same time expressing the hope that they would be able to carry out his wishes as expressed in any future letters or memorandum signed by him. By cl. 13 of the will he provided that his executors might at their discretion appropriate any part of his estate "or the investments for the time representing the same" in or towards satisfaction of any legacy, and might for that purpose determine the value of any part of his estate "or the investments thereof."

A codicil to the testator's will dated March 25, 1923, contained the following provision: "I forgive all debts owing to me." Apart from this the codicil only contained two further legacies, bringing up the total of the pecuniary legacies bequeathed by the testator's will and codicil to 21,700*l.*

The testator's estate was valued for probate at upwards of 52,000*l.* net personal estate and 10,000*l.* real estate. The testator's personal estate consisted, to the extent in value of 22,000*l.* or thereabouts, of British and foreign Government securities, redeemable debentures and debenture stock in commercial companies, and the mortgages and charges and loan stock which were the subject matter of this application. The personal estate also included sums of irredeemable

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debenture stock to the value of about 2000*l.* His estate also included balances on drawing account at various banks totalling some 500*l.*, a policy of insurance for 200*l.* on the testator's life, certain loans to friends and past employees to start them in business, and a number of interest and dividend warrants received by the testator before his death (but not cashed) in respect of investments in British Government bonds and stocks and the stocks and shares of railway and other companies.

The executors notified His Majesty's Treasury and the railway and other commercial companies and banks concerned of the provision in the testator's codicil forgiving the debts owing to him; but no claim had been made by them. The present summons was however taken out by the executors at the suggestion of the companies and societies concerned to have it determined whether this provision in the testator's codicil operated as a legacy :—

(1.) To the defendants, the First Garden City, Ld., the National Cottage Society, Ld., and the Norton Cottage Society, Ld., respectively of the sums secured by the following mortgages and charges :—

(*a*) A mortgage dated January 28, 1916, and made between First Garden City, Ld., of the one part and the testator's father, the Honourable Sir Ralph Neville of the other part, to secure the sum of 5000*l.* and interest.

(*b*) Three memoranda of agreement and charge dated December 13, 1915, February 15, 1916, and July 27, 1916, and respectively made between the National Cottage Society, Ld., of the one part, and the testator's father of the other part, to secure the respective sums of 550*l.*, 731*l.* and 69*l.* and interest.

(*c*) A memorandum of agreement and charge dated September 25, 1915, and made between the Norton Cottage Society, Ld., of the one part, and the testator's father of the other part, to secure the sum of 150*l.* and interest; and

(2.) To the defendants, Letchworth Housing Society, Ld.,

Copartnership Tenants, Ld., Howard Cottage Society, Ld., and Ealing Tenants, Ld., respectively of the following amounts of loan stock issued by such defendants to the testator's father and held by the testator at the date of his death.

(*a*) 200*l.* 4½ per cent. loan stock of Letchworth Housing Society, Ld.

(*b*) 300*l.* 4 per cent. loan stock of Copartnership Tenants, Ld.

(*c*) 300*l.* 4½ per cent. loan stock of Howard Cottage Society, Ld.

(*d*) 200*l.* 4 per cent. loan stock of Ealing Tenants, Ld.

All these mortgages and charges and sums of loan stock had passed to the testator under the will of his father. The whole of the mortgage debts secured by the mortgages and charges were still owing, and in the case of the first mentioned mortgage, the testator had obtained the increase of the rate of interest payable from 5 to 6 per cent.

The First Garden City, Ld., was a company registered under the Companies Acts with the object of erecting dwelling-houses, labourers' and artizans' cottages, and other buildings. There was nothing unusual about its memorandum and articles of association except that the dividends on its ordinary shares were by art. 129 not to exceed 5 per cent. per annum. The National Cottage Society, Ld., was a society registered under the Industrial and Provident Societies Acts, 1893 to 1895, with similar objects. The Norton Cottage Society, Ld., was a private company registered under the Companies Acts, with similar objects and with a limitation of dividends similar to that in the case of the First Garden City, Ld. The judge found that there was nothing to render the mortgages and charges granted by these bodies different from ordinary mortgage securities.

The Letchworth Housing Society, Ld., was a society registered under the Industrial and Provident Societies Act, 1893, with rules under which the issue of loan stock was authorized. The material rules are :—

Rule 23. "*Loans in General.*—(1.) The committee may from time to time obtain advances of money for the purposes

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of the society upon the securities of bonds, or agreements, or promissory notes, or certificates of indebtedness on account of loan stock, as provided hereafter, or of a mortgage, either legal or equitable, of any property thereof."

Rule 24. "*Provisions as to Loan Stock.*—Any amount of loan stock, being within the total limit mentioned in the preceding rule, may be issued by the committee to members and other persons who may agree to accept the same, subject to the conditions following: . . . .

(*c*) It shall not confer a right to demand payment of the principal from the society unless the interest aforesaid is in arrear for two consecutive years, or in the event of the liquidation of the society."

A later provision in this rule incorporated (inter alia) r. 29 with certain alterations, under which it appeared that the committee might, on the application of the holder of any loan stock, repay any sum not exceeding the amount credited thereon; and should pay the whole sum so credited (except in a case mentioned in r. 36) where they refused to confirm the transfer of any stock.

Copartnership Tenants, Ld., the Howard Cottage Society, Ld., and Ealing Tenants, Ld., were also registered under the Industrial and Provident Societies Act, 1893, and the rules as to loan stock were in every case substantially the same.

L. W. Byrne for the summons.

Rolt K.C. and *Warwick Draper* for First Garden City, Ld., National Cottage Society, Ld., Norton Cottage Society, Ld., Letchworth Housing Society, Ld., and Howard Cottage Society, Ld. The expression, "I forgive all debts owing to me," is wide enough to effect the release of everything that was legally a debt of the testator at his death. It must operate, therefore, as a release of the mortgage debts secured by the various mortgages and charges granted by some of the defendants. All these documents contained covenants for payment of the mortgage debts so that they could be sued for as debts. Thus it was decided that a direction by a testator

for payment of his debts out of personalty operated to show a contrary intention within s. 1 of Real Estate Charges Act, 1854 (Locke King's Act) (17 & 18 Vict. c. 113), with the result that mortgage debts secured on real estate of the testator became payable out of personalty: *Moore* v. *Moore* (1); and see Carson's Real Property Statutes, 2nd ed., p. 436. It became necessary to pass another Act in 1867 to alter this (30 & 31 Vict. c. 69). There is here no context in the codicil to enable the Court to give a more limited meaning to the word "debts." Moreover there was here something different from a mere investment on mortgage. The testator's father was greatly interested in these various societies, and the testator himself was a director of certain of the societies and took a personal interest in them. There was thus a special reason for releasing these mortgage debts.

It may be suggested that a distinction should be drawn between investments and debts, but there is nothing to indicate such a distinction in the codicil.

[TOMLIN J. On this view these words in the codicil would operate as a release of sums owing in respect of Government loans and debentures in which the testator had invested money.]

That is so, and the result may seem remarkable, but testators do strange things. Moreover, where is it possible to draw the line, if it be sought to put a more limited construction on "debts"? It may be argued that the testator was not the original creditor as regards these mortgage debts, but that is immaterial. He was the creditor at the date of his death. This construction will also, no doubt, involve the release of uncashed dividend and interest warrants, and it may be that this effect was not present to the testator's mind. But it is for the Court to construe the actual words employed.

As regards the sums of loan stock, they are loans to the various societies, like debentures of a company, but are not, it is true, redeemable, except in certain special circumstances. The holder of loan stock is, however, a creditor of the society that has issued it, and the words of the codicil must operate

(1) (1863) 1 D. J. & S. 602.

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as a release in respect of those sums of loan stock held by the testator. Money on deposit at a testator's bank passes under a bequest of " monies owing to me at the time of my decease " : *In re Derbyshire* (1) ; and in *In re Taylor* (2), the meaning of a bequest of " the money I have and am entitled to now and at any future time " was discussed.

There Younger L.J. considered the applicability of these words to perpetual debenture stock, which closely resembles this loan stock, and said he saw no ground for distinguishing between redeemable and irredeemable debenture stock, and gave as one reason that in the latter case the interest on the debenture stock " is payable as a debt, although the principal is not so repayable." It is therefore contended that the forgiveness of debts operates as a release of the loan stock also.

Myles for Copartnership Tenants, Ld., and Ealing Tenants, Ld., adopted this argument.

Gavin Simonds K.C. and *Bryan Farrer* for the Skinners Company. The meaning of the expression, " I forgive all debts owing to me," must be ascertained by relation to the circumstances, occasion, and date on which it is used: see *In re Rayner*. (3) Some limitation ought to be put on the meaning of the word " debts." The testator cannot have been intending to give away a large part of his investments and so to cut down the residue of his estate remaining after payment of the pecuniary debts to a negligible quantity : compare cl. 13 of the will.

[TOMLIN J. The words " I forgive " seem curious words to employ in reference to a release of debentures.]

It is no doubt true that if the full legal meaning is not given to " debts," some line has to be drawn ; but need the Court concern itself with that ? All that has to be decided is whether these particular mortgage debts and sums of loan stock are released. This is a case where the Court might apply the words once used by a judge, that while he did not know where night ended and day began, he did know that midnight

(1) [1906] 1 Ch. 135. (2) [1922] 1 Ch. 569 ; [1923] 1 Ch. 99.
(3) [1904] 1 Ch. 176, 188.

was night and that midday was day. So here, whatever may be the correct line, is it not clear that the testator did not intend to include these mortgage debts and sums of loan stock under the word "debts"?

It is suggested that a distinction must be drawn between investments and debts, and that what the testator was contemplating were sums advanced for the purpose of assisting a friend, so that the friendship was the motive both of the advancement and forgiveness. The Court is entitled to consider whether the word "debts" was used in a legal or popular sense. The former construction would result in an obvious absurdity, and from this the Court will recoil.

Rolt K.C. in reply. *In re Rayner* (1) was an entirely different case, but it is not denied that the Court in construing the testator's language is entitled to regard itself as seated in his chair. This does not enable the Court to cut down the meaning of a clear unambiguous word merely because it does not like the result of giving it its proper meaning. There is here no context to enable the Court to limit the meaning.

TOMLIN J. I have to determine a question of construction upon the will and codicil of Mr. Ralph Neville, the son of the late Mr. Justice Neville. The clause the meaning of which I have to ascertain is contained in seven words in the codicil: "I forgive all debts owing to me." I think it will be relevant to state, before I embark upon a consideration of this provision, the nature of the testator's estate at his death. [His Lordship then stated the facts as to the testator's estate set out above and the nature of the assets of the estate as to which the question arose here and of the companies and societies that had granted the mortgages of charges or issued the loan stock in question, and after coming to the conclusion that the mortgages and charges differed in no way from ordinary mortgage securities, continued:] The net result of the rules with regard to the loan stock appears to be in effect that the stock is in every case irredeemable, except in two or three

(1) [1904] 1 Ch. 176.

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possible events, which may not necessarily ever happen. For example, it may never happen that any of these societies go into liquidation or make default in payment of interest for two consecutive years; so that whatever else may be said about these sums of loan stock, they certainly do not seem to have the characteristics of pure debts.

Counsel for these various companies and societies have put forward an argument in support of a construction of this short clause in the codicil which would have the effect of releasing the obligations of these respective companies and societies to the testator's estate, on the ground that these obligations are debts within the meaning of the clause in the codicil, and having been forgiven, have naturally come to an end. That, speaking generally, is the contention.

I ought to have said, when describing the nature of the testator's estate, that it included some small sums owing to him on personal security from a friend, the sum of 700*l.* lent to one who had been an employee of the testator for the purpose of enabling him to start in business, and a sum of under 200*l.*, lent to a member of a boys' club in which the testator was interested to enable him to start in business. There were also a number of interest and dividend warrants received by the testator before his death, but not cashed, in respect of various investments forming part of his estate, including a warrant for interest from the Letchworth Housing Society, which Mr. Rolt contends is released, whether he succeeds or fails on the main branch of his case. [His Lordship then referred to the material provisions of the testator's will and codicil and continued:] It is quite plain that for the purpose of construing this phrase in the codicil I am entitled to look not only at the verbal context in the codicil, if I can get any assistance or comfort from that, but also at the will itself and the language employed in the will; and I am entitled to know and to form my decision with a view to the circumstances of the testator's estate and the subject matter upon which it is apparent that his will was intended to operate. I think, perhaps, that I cannot do better than adopt the language employed by Vaughan Williams L.J. in

In re Rayner (1), when he said that "the meaning of a word is relative to the circumstances and occasion and date on which the word is used."

The argument which has been addressed to me on behalf of the defendant companies and societies is that the word "debts" has in point of law a definite meaning—namely, the amount owing in every case where one individual, or legal entity, owes money to another. It is contended, therefore, that when a testator has forgiven all his debts, all his debts of whatever nature are released, unless there is in the context something which justifies the Court in departing from the strict legal meaning; and with a courage that is worthy of the occasion these defendants say that the result in this case is in point of law that in relation to every investment which the testator had, the legal character of which was in the nature of a debt, he has made a present of it to the concern from which the money is owing. I suppose in regard to Exchequer Bonds, 1928, the present would be in the nature of a present to the community through the instrumentality of the Chancellor of the Exchequer. These bonds are a debt, and I do not see why in point of law, if the argument be well founded, the amount of these bonds would not be released; but whether that be so or not there are a large number of investments in the testator's estate which clearly fall within the ordinary category of debts, if "debts" include in this connection every obligation by a person or legal entity to pay money to another. For example, there can be no doubt that the Anglo-Persian Oil Company, Ld., have on this construction received a present from the testator of the sum of 1500*l.* and interest secured upon 5 per cent. debenture stock of that company, redeemable in 1960. The generosity on that basis of the testator has extended to bodies of various kinds: the City of Montreal appears to benefit in company with the Government of Victoria and the South Australian Railway. Whether the Mashonaland Railway, the debentures of which are irredeemable, falls within the category may be a little doubtful; but in view of Mr. Rolt's argument, that the

(1) [1904] 1 Ch. 176, 188.

TOMLIN J. release of all debts operates to release all claims for interest, I think that the effect would be in the case even of the perpetual debenture stock that the right to interest would be gone for ever; and this possibly would operate as a release of the whole obligation. But however that may be, and however the matter would work out in detail if this construction were applied strictly, I think it is plain that the effect of the clause so construed would be to destroy a large portion of the testator's estate for the benefit of a number of bodies and associations in various parts of the world, to whom there is no reason to suppose that the testator had any marked benevolent feeling.

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The question is whether I am really driven to place upon this will and codicil a meaning which to my mind is abundantly absurd. I do not think I am. I think that although these questions of construction may not be approached with a guessing mind, they may be approached with a mind that is endeavouring to apply some measure of common sense with a view to arriving at a conclusion which avoids the ridiculous if not always the inconvenient. I come to the conclusion that the debts which are to be forgiven by virtue of this clause are in fact more limited than is contended for by the defendant societies and companies. I am told that if I reach that conclusion I am deliberately placing myself in a difficulty, because if I do not accept the primary meaning of the word I am at a loss to find the point at which I should draw the line. In that connection I think the observation of another judge, to which Mr. Simonds referred me, is relevant. Although I may not be able to say where day ends or night begins, I can say quite definitely that midnight is night and midday is day; and so far as this case is concerned I propose to deal with it on that footing. I propose to say whether these disputed items are or are not within the phrase, "I forgive all debts owing to me," but I do not propose to lay down a hard and fast line fixing the limits within which this operates.

I think myself that on the true construction of the will and codicil it is quite plain as a matter of language that the testator regards investments as one thing and moneys owing to him in

a personal capacity, if I may use that phrase, as a wholly different thing. I think when he uses the phrase, "I forgive all debts owing to me," he is not moved by emotion at the thought of railway companies who owe him the money lent on the security of debenture stock. What he has in his mind is that he may have lent some of his friends or acquaintances sums of money which he would not desire to recover from them. The word "forgive" seems to me to introduce a personal note into the matter with which the testator is dealing; and when I consider that and consider also the scheme of his will and take note of his direction with regard to the appropriation of investments, I feel satisfied that he is not using "debts" in the wide sense suggested by Mr. Rolt, I am confirmed in this view when I take into account, as I am entitled to do, the character of the testator's estate, and find that the application of that wide construction would lead to the destruction of a large part of it.

I come therefore to the conclusion that none of these loan stocks falls within the word "debts" in the sense in which the testator is forgiving them here. They seem to me to be wholly outside what he is contemplating and dealing with. I do not think that it is necessary to express an opinion as to what is the precise legal position of the loan stock. It is enough, I think, for my purpose to say that neither the sums of loan stock, which may, I think, be rather less like "debts" than the mortgage debts, nor the mortgage debts, are "debts" within the meaning of this clause in the codicil.

It has been urged upon me that the testator and his father both took a personal interest in some of these societies and that they were directors of them. I am unable to appreciate the relevancy of that. There is no evidence, so far as I can see, of the motive which moved the testator in dealing with these particular investments, even if such evidence, if adduced, would have been admissible. I do not think that this consideration affects the question.

I therefore come to the conclusion in regard to these particular items of loan stock and mortgage debts that they are not released. It is not necessary for me to express any

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opinion in relation to the more personal debts which I have mentioned, because they have been dealt with by the executors and the residuary legatees who are sui juris.

Solicitors: *Western & Sons; Balderston, Warren & Co., for Bolton & Tabor, Letchworth; Chalton Hubbard; Dawson & Co.*

H. C. G.

TOMLIN J. 1924 *Oct.* 21, 22, 28.

LOCKETT *v.* NORMAN-WRIGHT.

[1924. L. 1140.]

Contract—Agreement to grant a Lease—Agreement "subject to suitable agreements being arranged between your solicitors and mine"—Conditional Agreement—Specific Performance.

The plaintiff having informed the defendant of his willingness to let his top flat for eight years at a yearly rent of 300*l.*, he received on February 25, 1924, a telephone message from the defendant that he would take the flat on the terms arranged, and on February 26, 1924, a letter in which the defendant said: "Confirming my conversation over the telephone this afternoon, subject to suitable agreements being arranged between your solicitors and mine, and subject to your carrying out the decorations of the top flat at your house 117 Park St., W. 1, ... I am prepared to take the flat for a period of eight years, at an inclusive rental of 300*l.* p.a. including all rates, taxes, etc. . . . ." The plaintiff replied that he had sent the defendant's letter on to his solicitor and that application was being made to the head landlord for permission to make the alterations. A correspondence ensued between the solicitors on either side. On March 17 the alterations were put in hand and by March 31 a draft lease had been approved with the term commencing from March 25. The plaintiff's solicitors had made a note on the draft: "If the premises are not ready for occupation and use by the 25th March, the landlord will hand over a letter to the effect that the rent is not to commence until the premises are ready for occupation," and at the foot of this the defendant's solicitor had added: "I observe. It is of course agreed that the alterations arranged will be carried out to the tenant's reasonable satisfaction." On April 4 the plaintiff's solicitors intimated that they were ready to exchange lease and counterpart and that the landlord had signed a letter as proposed. On April 11 the defendant refused to go on with the matter. In an action by the plaintiff for specific performance:—

Held, that the expression "subject to suitable agreements being arranged between your solicitors and mine" was a condition precedent to any concluded bargain and did not make the solicitors agents to conclude the bargain; and accordingly that there was no absolute contract

between the parties that the plaintiff could enforce either by virtue of the letter of February 26, 1924, and the antecedent telephonic conversation, or by reason of this letter and the subsequent dealings between the solicitors, including the draft lease and the notes thereon.

WITNESS ACTION.

The following statement of the facts is substantially taken from the judgment.

The plaintiff is a dental surgeon practising at Hereford House, Park Street, in the county of London, of the second, third and fourth floors, of which he is and was at all material times the lessee. Early in 1924 he determined to sublet the third and fourth floors.

At two interviews at Hereford House, the first taking place on February 19, 1924, between the plaintiff and the defendant's wife and daughter, and the second taking place on February 26, 1924, between the plaintiff and the defendant and his wife and daughter, the plaintiff expressed his willingness to let the flat for a term of eight years at a rent of 300*l.* per annum and to execute at his own expense certain alterations and other work in the flat, particulars of which were approved by the defendant and his wife, including the conversion into a kitchen of a particular room. It does not appear that any date was mentioned from which the term and rent were to run. It is not suggested that at these interviews any concluded bargain was arrived at, but later in the day of February 26, 1924, the defendant telephoned to the plaintiff that he would take the flat on the terms arranged and had posted the plaintiff a letter.

On the following day the plaintiff received from the defendant a letter dated February 26, 1924, in the following terms: "Confirming my conversation over the telephone this afternoon, subject to suitable agreements being arranged between your solicitors and mine, and subject to your carrying out the decorations of the top flat at your house, 117 Park Street, W. 1, and the enclosing of the flat from the staircase and the lift, I am prepared to take the flat for a period of eight years, at an inclusive rental of 300*l.* per annum, including all rates, taxes, etc. It is understood that you will

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instal the gas and electric cables ready for the connecting of brackets, stoves, etc. My solicitor is H. Pinder-Brown, Esq., 240 High Holborn, W.C., with whom I would be glad if your solicitors would communicate regarding the agreement. . . . ." The plaintiff answered on the same day as follows: "Many thanks for your letter. I have sent it on to my solicitor and we are applying to-day for permission to make the necessary alterations." The plaintiff then instructed his solicitors, and they took the matter up with the defendant's solicitor, and ultimately by March 31, 1924, a draft lease had been approved by the respective solicitors, the term being expressed in the draft to run from March 25. A note was appended to the draft by the plaintiff's solicitors in these terms: "If the premises are not ready for occupation and use by the 25th March, the landlord will hand over a letter to the effect that the rent is not to commence until the premises are ready for occupation"; and at the foot of this note the defendant's solicitor wrote: "I observe. It is of course agreed that the alterations arranged will be carried out to the tenant's reasonable satisfaction."

In the meantime on March 17 the work in the flat was begun and was completed on April 19. On March 25, as the result of a telephone message from the defendant to the builder, the plaintiff agreed that a gas boiler should be put in in lieu of a coal boiler as originally intended. On April 3 the defendant through his solicitor, whom he saw on that day, protested against the fixing of a geyser in the bathroom. The next day the plaintiff's solicitors wrote to the defendant's solicitor that the geyser should be removed and stated: "We are ready to exchange lease and counterpart and our client has signed a letter which we will hand to you on completion agreeing to complete the work and that the rent shall not commence to run until the premises are ready for occupation and use."

On April 9 the defendant's wife called at the premises and protested to the plaintiff that another specified room should have been made the kitchen. According to the plaintiff's evidence, which is uncontradicted and which I accept, the plaintiff satisfied her that she had herself at the earlier

interviews chosen the room which had been converted into a kitchen in spite of the plaintiff's recommendation to the contrary. On the same day the defendant's wife chose papers for the decoration of the rooms at Messrs. Arthur Sanderson & Sons' in Berners Street, caused each paper to be marked with the description of the room in which it was to be hung, and had such papers forwarded to the builders doing the work; and the papers were hung in accordance with the wishes of the defendant's wife as so communicated to the builders.

On April 11 the defendant's solicitor wrote to the plaintiff's solicitors the following letter: "Referring to your conversation with me to-day on the telephone my client writes me as follows: 'In reference to the flat at 117 Park Street. My wife visited the flat yesterday and found that the kitchen had been built next to her bedroom, whereas it should have been built on the other side of the lift in the biggest of the two rooms on that side. Further to this, the boxing-in of the lift near the staircase, is not at all what was promised. The kitchen arrangements, such as the sink, etc., are too small; no maid could use them. In any case we most certainly could not have the kitchen next to the only good bedroom in the flat. Moreover so much time has been wasted, we were told that we should be able to enter into the flat on the 25th of last month, that I must decline to go any further in the matter.' I naturally regret the present position, but from the communication I have received from my client relative to the matter he seems very determined not to entertain the flat further for the reasons herein mentioned."

Some further correspondence took place, but the defendant adhered to his decision not to proceed, and on May 9, 1924, the plaintiff issued the writ in this action claiming specific performance of the alleged contract by the defendant to take the lease.

Galbraith K.C. and *G. D. Johnston* for the plaintiff. There is here a valid completed contract between the parties, and even if the letter of February 26, 1924, were not a sufficient

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memorandum of the contract to satisfy the Statute of Frauds, there has been part performance.

Sutton-Nelthorpe for the defendant. There has been no concluded contract. The words in the letter of February 26, 1924, "subject to suitable agreements being arranged between your solicitors and mine" have the same effect as "subject to formal contract," so that the letter of February 26, 1924, contains a conditional offer, and even if accepted cannot be enforced by specific performance: *Rossdale* v. *Denny*. (1) It contemplates a further agreement being made: *Coope* v. *Ridout* (2); *Chillingworth* v. *Esche* (3); see also Fry on Specific Performance, 6th ed., p. 246. Further, there is no sufficient memorandum to satisfy the Statute of Frauds, for the date of the commencement of the tenancy does not appear in the letter of February 26, 1924; and there has not been part performance sufficient to render the contract enforceable.

Galbraith K.C. in reply. The agreement that is to be arranged between the parties' solicitors according to the letter of February 26, 1924, is not a final contract, but the actual underlease that was to carry out the contract. The letter of February 26, 1924, was on its true construction an agreement to take the sublease of the premises subject to two conditions, both of which have been complied with—namely, the arrangement between the solicitors of the form of underlease and the carrying out of the decorations of the flat and the enclosing of the flat from the staircase and lift. It is submitted either that this letter of February 26, 1924, combined with the antecedent conversation over the telephone constitutes a completed contract, or that this letter combined with the subsequent correspondence between the solicitors and the approved draft lease with the notes upon it constitute such a contract.

[He also referred to *Dickinson* v. *Barrow*. (4)]

Cur. adv. vult.

1924. Oct. 28. TOMLIN J. delivered the following written judgment: This is an action to enforce specific

(1) [1921] 1 Ch. 57.
(2) [1921] 1 Ch. 291.
(3) [1924] 1 Ch. 97.
(4) [1904] 2 Ch. 339.

performance of an alleged agreement for the grant by the plaintiff to the defendant of a lease for eight years at a rent of 300*l.* per annum of the fourth floor of Hereford House, No. 117 Park Street, in the county of London.

No evidence was called by the defendant, and upon the oral and other evidence adduced by the plaintiff I find the facts to be as follows. [His Lordship then stated the facts as set out above.]

The plaintiff in his statement of claim alleges (1.) an agreement constituted by the verbal message on the telephone of February 26, and the defendant's letter of the same date; and (2.) alternatively, an agreement by the defendant by his solicitor constituted by the letter of February 26, the correspondence between the solicitors, the approved draft lease and the notes thereon. The defendant pleads no agreement and the Statute of Frauds.

It is no part of my duty to pronounce whether or not the conduct of any of the parties concerned in this matter is open to censure. All I have to do is to determine whether there is or is not a concluded contract between the plaintiff and defendant which the plaintiff can enforce.

I am satisfied that prior to the letter of February 26 and what occurred subsequently thereto there was no concluded bargain. The telephone message of February 26, whatever its precise form, cannot, I think, be regarded apart from the letter of February 26.

The letter of February 26 is conditional in form, and it is urged on behalf of the defendant that the phrase "subject to suitable agreements being arranged between your solicitors and mine" brings the case within the principle of such decisions as *Rossdale* v. *Denny* (1); *Coope* v. *Ridout* (2); and *Chillingworth* v. *Esche*. (3) The question is one primarily of construction. Is there any real distinction between the language used here and such phrases as "subject to a formal contract," "subject to contract," "subject to a proper contract to be prepared by the vendor's solicitor."

(1) [1921] 1 Ch. 57. (2) [1921] 1 Ch. 291.
(3) [1924] 1 Ch. 97.

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The plaintiff urges that the phrase here means: "I agree to take a lease at the rent and for the term mentioned in the letter and upon such other terms as the solicitors of the parties may settle between themselves"; and that when once the draft lease had been approved by the solicitors the condition was fulfilled and there was an absolute contract.

I do not think I can place any such construction upon the language. I think the natural meaning of the language is that the execution of a suitable agreement or suitable agreements in a form approved by the solicitors on both sides is a condition of any concluded bargain. The construction suggested on behalf of the plaintiff is artificial, and I do not think that the Court should place an artificial meaning on the language employed merely in order to make a contract of that which would otherwise be no contract. Solicitors are not, in the absence of specific authority, agents of their clients to conclude a contract for them, and I do not think that I can read this letter as making the solicitors agents to conclude the bargain or arbitrators to settle its terms; and I may add it is plain from the letter of the plaintiff's solicitors of April 4 that there were other matters besides the form of the draft lease to be agreed. Further the letter of February 26 cannot be treated as an unconditional acceptance of any previous verbal offer, and, if it is an offer in itself, the plaintiff's answer is not in terms an acceptance but only an intimation that he has sent it to his solicitor and that he is applying for permission to make the alterations. I think therefore that I must read this letter in the way I have indicated and that the principle of the decisions cited to me applies, and that there was no contract at this stage.

There remains the plaintiff's alternative plea. I do not think this plea can be made good. There is no evidence that the defendant's solicitor was ever authorized to enter into a contract in his behalf, and I do not think any such authority can be implied from the circumstances of the case. Further, as I have already indicated, there were matters apart from the form of the lease (see the letter of the plaintiff's

solicitors of April 4) for which no agreed provision had been made before the defendant's refusal to proceed.

In the view I take of the case it becomes unnecessary to consider the questions as to the Statute of Frauds and part performance which were raised and discussed in the course of the hearing.

I come to the conclusion that the action fails and must be dismissed with costs.

Solicitors : *Templeton & Holloway ; H. Pinder Brown.*

H. C. G.

SOUTHPORT CORPORATION *v.* BIRKDALE DISTRICT ELECTRIC SUPPLY COMPANY, LIMITED.

[1923. S. 2873.]

Electricity—Provisional Order—Maximum Charge—Local Authority original Undertakers—Transfer to new Undertakers with Board of Trade's Approval—Collateral Contract by new Undertakers not to exceed Prices of adjoining Borough—No Board of Trade Approval—Ultra vires—Electric Lighting Act, 1882 (45 *&* 46 *Vict. c.* 56), *s.* 11.

By a Provisional Order of 1898 the Birkdale Urban Council were constituted electricity undertakers in Birkdale with power to charge up to a certain maximum price, but with authority to make special agreements with particular consumers as to price.

By a Transfer Deed of December 31, 1901, approved by the Board of Trade, the Birkdale Council transferred the undertaking to the defendants, with a provision (cl. 18) for retransfer if the defendants made default in their obligations as undertakers.

By a Supplemental Deed of the same date, made without the approval of the Board of Trade, the defendants agreed with the Birkdale Council not to charge higher prices than those charged in the adjoining borough of Southport.

In 1911 the Birkdale District and the contractual rights of the Birkdale Council were transferred to the Southport Corporation, the present plaintiffs, but the defendants still remained electricity undertakers in Birkdale.

The defendants having recently begun to charge higher prices than the plaintiffs, the plaintiffs brought this action to restrain their breach of agreement.

The defendants contended that their agreement was ultra vires both under the Electric Lighting Act, 1882, s. 11, which prevented them

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divesting themselves of their statutory powers without the consent of the Board of Trade, and also under the general law applicable to statutory undertakings:—

Held, that as the agreement, which was not an agreement with a particular consumer as to prices, might conceivably in the future hamper the defendants in the proper performance of their statutory duties, it was ultra vires.

Staffordshire Canal Navigation v. *Birmingham Canal Navigations* (1866) L. R. 1 H. L. 254 and *York Corporation* v. *Henry Leetham & Sons* [1924] 1 Ch. 557, 569 applied.

WITNESS ACTION.

By the Birkdale Electric Lighting Order, 1898, confirmed by the Electric Lighting Orders Confirmation (No. 8) Act, 1898 (61 & 62 Vict. c. ccvii.), the Birkdale Urban Council were empowered (ss. 4, 5, 6) as undertakers to supply and distribute electricity for all public and private purposes within the urban district of Birkdale as then constituted.

Sect. 21 required the undertakers to furnish a sufficient supply of energy to the owners and occupiers within the area of supply.

Sect. 24 provided that the undertakers might charge for energy supplied by them to any ordinary consumer (otherwise than by agreement)—(1.) By the actual amount of energy so supplied; or (2.) By the electrical quantity contained in the supply; or (3.) By such other method as might for the time being be approved by the Board of Trade. Provided that a consumer who objected to method (3.) might require the undertakers to charge him at their option by methods (1.) or (2.).

Sect. 25 provided that the prices should not exceed those stated in Sch. 4—namely, method (1.) 13*s.* 4*d.* per quarter for the first twenty units and 8*d.* per unit afterwards, or method (2.), a charge by quantity based on those rates; or in the case of a method of charge approved by the Board of Trade such price as the Board should on approving that method determine.

Sect. 26 provided that, subject to the provisions of the Order and of the principal Act [i.e., the Electric Lighting Acts, 1882 and 1888, and any other Acts incorporated therewith],

and to the right of the consumer to require that he should be charged according to some one or other of the methods above mentioned, the undertakers might make any agreement with a consumer as to the price to be charged for energy and the mode in which those charges were to be ascertained and might charge accordingly.

Sect. 57 empowered the Board of Trade to revoke the Order at any time with the consent and concurrence of the undertakers.

Sect. 59, sub-s. 1, provided that at any time after the commencement of the Order the undertakers might with the consent of the Board of Trade by deed to be approved by the Board of Trade transfer their powers, duties, liabilities and works to any company or person subject to such exceptions and modifications (if any) and for such period and upon such terms as might be specified therein, and either as to the whole or any part or parts of the area of supply and during the said period but subject to the provisions of the Order that company or person should to the extent of the powers, duties and liabilities so transferred be the undertakers for the purposes of the Order.

Sect. 71 provided that nothing in the Order should exempt the undertakers or their undertaking from the provisions of or deprive the undertakers of the benefits of any general Act relating to electricity, or to the supply of or price to be charged for energy which might be passed after the commencement of the Order.

By a Deed of Transfer dated December 31, 1901, and made between the Birkdale Urban Council of the one part and the defendants of the other part, in consideration of the payment of 700*l.* the Birkdale Council transferred the undertaking and all their rights, duties and liabilities under the 1898 Order to the defendants [who had been incorporated for that purpose and], who save as thereinafter appeared were to be the undertakers for the purpose of the Order.

Clause 4 provided that if at any time after the expiration of seven years after the date of this Deed of Transfer the Birkdale Council should make a representation to the Board of Trade

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that the prices or methods of charge stated in Sch. 4 of the 1898 Order or approved by the Board of Trade ought to be altered, the Board of Trade, after inquiry, might make an Order varying those prices or methods of charge or substituting other prices or methods of charge in lieu thereof, and the prices or methods of charge so varied or substituted should have effect on and after such day as might be mentioned in the Order as if they had been stated in the schedule: Provided always that the prices and methods of charge for the time being in force might be altered in like manner at any time after the expiration of any or every period of seven years after the last alteration.

Clause 16 provided that the defendants should not consent to or concur in the revocation of the 1898 Order under the provisions of s. 57 thereof without the approval in writing of the Birkdale Council.

Clause 17 provided that s. 59 of the Order should not apply to the defendants as undertakers, and they should not, save as provided by this Deed of Transfer, be entitled to sell the undertaking or to transfer any of the powers, duties and liabilities thereby transferred to them to any other company or person.

Clause 18 provided that the defendants should duly and effectually perform all the obligations imposed upon them by this deed of transfer or as undertakers by the 1898 Order or by any regulations made by the Board of Trade thereunder. If any question should arise whether the defendants had made default in the due and effectual performance of those obligations that question should, if the Birkdale Council so required and whether the defendants were or were not liable in respect of that default to any other penalty under the Electric Lighting Acts or the 1898 Order, be determined by arbitration; and if the arbitrator was of opinion that the defendants had failed in material respects to work the undertaking as required by those Acts and the 1898 Order, and that it was desirable in the public interest that the working thereof should be resumed by the Birkdale Council, he might, by his award, require the defendants to sell the undertaking to the

Birkdale Council, and thereupon the Birkdale Council might purchase and the defendants should sell the undertaking on the following terms—namely, the market value of the plant, machinery and buildings (less depreciation), only to be taken into consideration; no other capital or goodwill to be recognized; the Birkdale Council to deduct all costs and charges incurred in taking over the concern from the amount awarded by the arbitrator.

Clause 21 provided that the Birkdale Council might within six months after the expiration of fourteen years from the date thereof, and within six months after the expiration of every subsequent period of seven years, by written notice require the defendants to sell them the undertaking upon terms of their paying the amount of capital properly expended by the defendants for the purposes of the undertaking, plus $12\frac{1}{2}$ per cent. if the notice was given within six months after the expiration of fourteen years; 10 per cent. if given within six months after the expiration of twenty-one years; $7\frac{1}{2}$ per cent. if given within six months after the expiration of twenty-eight years; and 5 per cent. if given within six months after the expiration of thirty-five years, but without any addition if given after the expiration of forty-two years.

This Deed of Transfer was duly approved by the Board of Trade on January 30, 1902.

By a Supplemental Deed dated December 31, 1901, and made between the Birkdale Council of the one part and the defendants of the other part, reciting that the Birkdale Council had agreed to transfer their powers under the 1898 Order to the defendants upon certain terms and conditions, some of which had been included in the Deed of Transfer approved by the Board of Trade, and reciting that other of those terms and conditions were not so included, but were part of the consideration for the transfer and were intended to be equally binding upon the defendants and the Birkdale Council, and to that end had been included in this Supplemental Deed, it was provided (cl. 4) that subject to any Order thereafter made by the Board of Trade the price to be charged by the defendants to private consumers of electrical energy should be

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for any quantity up to twenty units in any quarter 13*s.* 4*d.*, for any quantity not exceeding the equivalent of 100 hours of supply at the maximum demand in any quarter at the rate of 7*d.* per unit, and for any further quantity in such quarter in excess of the equivalent of 100 hours of supply at such maximum at the rate of 2*d.* per unit. But if in any year the price of electrical energy supplied exceeded the price of electrical energy supplied in the adjoining borough of Southport the before mentioned prices should be reduced and for so long as might be necessary in order that the said price might not exceed the price in the borough of Southport.

By an Indenture dated August 2, 1904, and made between the Birkdale Council of the one part and the defendants of the other part, supplemental to the Deed of Transfer and Supplemental Deed, it was provided (cl. 1) that subject to any Order thereafter made by the Board of Trade the price to be charged by the defendants to private consumers of electrical energy supplied after January 1, 1904, should be on the maximum demand system, unless any consumer elected as thereinafter mentioned to be supplied on a flat or even rate not exceeding 5*d.* per unit, and where the wirings and fittings were the property of the defendants not exceeding 6*d.* per unit. But if at any time the foregoing price exceeded the price of electrical energy supplied in the adjoining borough of Southport the foregoing prices should be likewise reduced, and for so long as might be necessary in order that the same might not at any time exceed the price in the said borough. The expression "unit" in this clause should have the same meaning as in Sch. I. of the 1898 Order.

By the Southport (Extension) Order, 1911, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 10) Act, 1911 (1 & 2 Geo. 5, c. clxxxv.), it was provided, art. iii. (1.), that the boundary of the existing borough of Southport should be altered so as to include the Birkdale Urban District.

Article xi. (3.) (*c*) provided that the provisions of the Electric Lighting Orders Confirmation (No. 2) Act, 1891 (54 & 55 Vict. c. l.), so far as that Act related to the Southport

Electric Lighting Order, 1891, should not extend and apply to that part of the borough which comprised the area of supply under the Birkdale Electric Lighting Order, 1898, until such date as the Southport Corporation became the undertakers under that Order, and until that date all powers, rights and duties of the Birkdale Council existing at the commencement of the present Order under the 1898 Order or under any agreement made in connection, therewith, should vest in and attach to the Southport Corporation, and a reference to the Southport Corporation should be substituted for any reference therein to the Birkdale Council. Upon the date on which the Southport Corporation became the undertakers under the Birkdale Lighting Order, 1898, that Order should be repealed.

Art. xv. (2.) provided that anything duly done or suffered and all contracts, deeds, bonds, agreements and other instruments (subsisting at the commencement of the present Order) entered into or made by the Birkdale Council or their predecessors in relation exclusively to any part of the added areas should be of as full force and effect against or in favour of the Southport Corporation and might be continued and enforced as fully and effectually as if, instead of the Birkdale Council or their predecessors, the Southport Corporation had done or suffered the same or been a party thereto.

Under and by virtue of the Southport Electric Lighting Order, 1891, confirmed by the Electric Lighting Orders Confirmation (No. 2) Act, 1891 (54 & 55 Vict. c. l.), the Southport Corporation were now carrying on an electrical undertaking within the area which on December 31, 1901, and August 2, 1904, constituted the borough of Southport.

For many years the defendants kept their prices down to those of Southport; but for the last two years they had exceeded the Southport prices.

On June 25, 1923, the plaintiffs, i.e., the Southport Corporation, commenced this action for an injunction to restrain this breach of agreement.

The defendants contended that the agreement was ultra vires, as without the consent of the Board of Trade they could not " divest themselves " of their powers to charge up

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to the maximum under the 1898 Order. They relied both on the Electric Lighting Act, 1882, s. 11, and also on the general law of ultra vires applicable to statutory undertakings. (1)

Sir John Simon K.C. and *Bischoff* for the plaintiffs. There is no objection to a qualification of the defendants' powers so long as that qualification is not incompatible with the proper performance of their statutory duties. For example, the defendants may agree to charge less than their statutory maximum. That only affects their profits.

Sect. 11 of the Electric Lighting Act, 1882, is explained in *Sudbury Corporation* v. *Empire Electric Light and Power Co.* (2) It is not in point here. The present question turns on s. 59, sub-s. 1, of the 1898 Order. Even if s. 11 were applicable the defendants' powers have not been "divested." They are only restricted as to price. If the defendants cannot carry on the undertaking at the restricted price, cl. 18 of the Deed of Transfer comes into operation, and the plaintiffs can purchase. The restriction of price is therefore really for the public benefit.

In *York Corporation* v. *Henry Leetham & Sons* (3) there was no alternative like cl. 18, and apparently there was no power to enter into special agreements. The defendants have that power under s. 26 of the Order and s. 20 of the Electric Lighting Act, 1882.

The mere absence of the Board of Trade's approval to this purely collateral agreement does not make it ultra vires: *Lambeth Corporation* v. *South London Electric Supply Corporation.* (4)

Clauson K.C. and *Guest Mathews* for the defendants. The contract is ultra vires and the defendants are not bound. The fact that they acquired and retained the undertaking on the terms of the Supplemental Deed is immaterial: *Ayr Harbour Trustees* v. *Oswald.* (5) No doubt those terms were always

(1) Sect. 11 provides that "no local authority, company, or person shall . . . . divest themselves of any legal powers given to them . . . . by any . . . . order . . . . without the consent of the Board of Trade."
(2) [1905] 2 Ch. 104, 109.
(3) [1924] 1 Ch. 557.
(4) (1907) 96 L. T. 440.
(5) (1883) 8 App. Cas. 623.

contemplated throughout, but the defendants could not put a general fetter on their charging powers without the Board of Trade's approval. A particular bargain with a particular consumer would be valid. But this is a general restrictive delegation of their power to charge, so that the plaintiffs could if they wished throttle the defendants' undertaking. That is a clear divesting within the Electric Lighting Act, 1882, s. 11.

The agreement is also bad under the general law of ultra vires in the case of statutory undertakings : *York Corporation* v. *Henry Leetham & Sons.* (1) We adopt the first two paragraphs of the plaintiffs' argument (2) in that case, and rely on all the cases referred to in the judgment.

Sir John Simon K.C. in reply. The only question is whether the agreement is really incompatible with the proper performance of the defendants' statutory duties : *Rex* v. *Leake Inhabitants* (3) ; *South Eastern Ry. Co.* v. *Cooper.* (4)

[ASTBURY J. Or may become incompatible in the future : *Canal Staffordshire Canal Navigation* v. *Birmingham Navigations.* (5)]

The maximum charge is only a restriction. It does not impose any duty to retain power to go up to that maximum. In that respect the *York* case (1) is questionable. The agreement does not really interfere with the 1898 Order at all. It merely restricts profits. That is a matter between the defendants and their shareholders. It does not interfere with the defendants' statutory duties.

Cur. adv. vult.

Nov. 11. ASTBURY J. [after reading s. 11 of the Electric Lighting Act, 1882, stated the facts and continued :] The plaintiffs, who seek to enforce the agreement contained in cl. 4 of the Supplemental Deed, contend that its provisions are not incompatible with the objects prescribed by the 1898 Order, or with the defendants' discharge and exercise of their duties and functions thereunder : see *South Eastern Ry. Co.* v. *Cooper* (4) and *Rex* v. *Leake Inhabitants.* (3)

(1) [1924] 1 Ch. 557, 569.
(2) [1924] 1 Ch. 564, 565.
(3) (1833) 5 B. & Ad. 469, 478.
(4) [1924] 1 Ch. 211, 224.
(5) L. R. 1 H. L. 254.

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The plaintiffs contend that the principle enunciated in those cases is not applicable to the permitted range of charges under the Order, and that a fair and reasonable limitation of those charges is not inconsistent with the carrying on by the defendants of their duties, or incompatible therewith. There is no duty, they say, to make the maximum charge. It is merely a limit of powers beyond which the undertakers may not go. In this connection they refer to s. 20 of the Electric Lighting Act, 1882, and to the practice of railway companies in making price or charging arrangements with particular customers: and Russell J.'s application of the above mentioned principle to the facts in the *York* case (1) is questioned.

The plaintiffs sum up their arguments as follows: "There is no duty to exact the maximum charge; the clause merely limits the power. Must the defendants in all circumstances keep their hands free qua charging powers? No, their only duty is bona fide to make such arrangements and charges as are desirable, and there are many railway agreements for exceptional rates lasting indefinitely, which are plainly not ultra vires as a fetter on their power to go up to the maximum rate. If the defendants are proved to have bound their hands to such an extent as to be incompatible with the discharge of their duties, their agreement to do so would be bad, but a mere agreement as to charges cannot cause such a result. The defendants have a discretion as to how and under what circumstances they will make their own profit. There is no divesting here of any power, but only a qualification of its exercise, and the non-approval by the Board of Trade of the contract in question is immaterial if its terms are collateral and not inconsistent with carrying out the Order. The restriction in the present case is only as to profits which the defendants may make, and having regard to the Transfer Deed, cl. 18, the charging power is not conferred upon them for the benefit of the public at all. In other words the contract as to prices is a matter merely for the defendants and their shareholders and not one affecting the public interest, and, having regard to

(1) [1924] 1 Ch. 557, 569.

cl. 18, charging powers per se are not provided for in the public interest."

The defendants, on the other hand, say that "they are the managers, with statutory powers, of the undertaking in which the public are interested, and as such are entitled to charge prices within certain limits necessary for the management of the undertaking. A corporation of a public nature may not so deal with its property as either to incapacitate itself from performing, or to fetter itself in the full performance of, its public duty. A body invested with statutory powers for a public purpose cannot delegate or divest itself of those powers or agree not to exercise them, or create any rights that will prevent or hamper the proper conduct of its statutory undertaking. The fact that the defendants took over and now hold the undertaking on the terms of the Supplemental Deed is irrelevant to the question whether the restriction in question was or is void: see *Ayr Harbour Trustees* v. *Oswald*. (1) Sect. 11 of the Electric Lighting Act, 1882, applies, and there is a similar prohibition or incapacity as regards such agreements at common law. A statutory body must discharge its own duties unfettered by agreements, especially with third parties. The agreement in question is a divesting in favour of a third party of the defendants' control of their undertaking, and of their power to charge up to a certain maximum such prices to their consumers as they shall consider right. Charging powers are essential to carrying on the undertaking, and it is part of the defendants' function to put on such charges as they may think necessary to carry on their statutory undertaking and duties satisfactorily. Clause 18 of the Transfer Deed does not contemplate default arising from fettering the right to charge enough so as impliedly to sanction such a fetter."

The defendants naturally rely on Russell J.'s judgment in the *York* case (2), for the principle therein enunciated. He says: "As I have already indicated, the plaintiffs are invested with statutory powers of charging such tolls, within limits, as they may deem necessary for the purpose of carrying on these

(1) 8 App. Cas. 623. (2) [1924] 1 Ch. 557, 569.

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two undertakings in which the public are interested. The effect of these two agreements is that they bind themselves for a period, the duration of which depends upon the volition of the defendants, not to exercise those powers as against them. No matter what emergency may arise during the currency of the agreements the Corporation have deprived themselves of the power to charge the defendants such increased tolls as might enable them to cope with the emergency. They have for so long a time as the defendants desire to that extent wiped out or fettered their statutory power. If that be, as I think it is, the effect of these agreements, they are, in my opinion, agreements which are ultra vires the Corporation." They also rely on the authorities referred to by Russell J. in the *York* case (1), which it is unnecessary for me further to read.

The question in these circumstances is whether the restriction in question is or is not valid. It is part of the public policy of our law that the sanctity of contract should not lightly be interfered with. The parties to this agreement were business people making, as they believed, a reasonable business arrangement for carrying out the Order in the Birkdale area, and if it were possible, within the law, to uphold the agreement, I should certainly do so. But the terms of the arrangement are such as, in my judgment, to make this impossible. This is not even a case of a particular arrangement as to prices made with a particular consumer or consumers, as in the railway cases mentioned, but it is an agreement not to charge any one within the defendants' area prices in excess of those charged by a neighbouring municipal body, which might conceivably in the future be able to cut down its charges to a figure which would prevent the defendants in their smaller and different area being able, if so limited, to carry on their undertaking, either at all, or so efficiently as in their judgment adequately to perform their duties under the Order. The question is not whether the plaintiffs are likely to do anything of the kind, but whether the defendants have, if the contract stands, bound themselves, if such a

(1) [1924] 1 Ch. 557, 569.

not impossible event were to occur: see *Staffordshire Canal Navigation* v. *Birmingham Canal Navigations*. (1) The agreement in question is not qualified as to time or circumstance, and contains no provision for modification or readjustment should necessity arise. This being so, I am of opinion that the defendants' main contention must prevail and that the agreement in question is one which, in circumstances that might arise, would be incompatible with their discharge of their statutory duties, although it is, in terms, only a qualification on a charging power.

The action must accordingly be dismissed.

Solicitors: *Sharpe, Pritchard & Co., for J. Ernest Jarratt, Town Clerk, Southport; Sydney Morse.*

G. R. A.

In re OLDHAM.

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[1923. O. 834.]

Distinguished. In re GREEN, DECD. [1951] 1 Ch. 148

Mutual Wills—Identical Terms—Husband and Wife—Each given absolute Interest—Identical alternative Provisions in Case of Lapse—Fresh Will by Survivor after accepting Benefit—No implied Trust to adhere to alternative Provisions.

A husband and wife made mutual wills in the same form in pursuance of an agreement so to make them, but there was no evidence of any further agreement in the matter.

Each gave his or her property to the other absolutely with the same alternative provisions in case of lapse.

The wife having survived and accepted her husband's property under his mutual will subsequently married again, and made a fresh will ignoring the alternative provisions of her own mutual will:—

Held, that in the circumstances there was no implied trust preventing the wife disposing of her property as she pleased.

Dufour v. *Pereira* (1769) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304 and *Stone* v. *Hoskins* [1905] P. 194 explained and distinguished.

WITNESS ACTION.

At the time of their marriage in 1878 a husband and wife, named Weldon, were aged about twenty-eight and twenty

(1) L. R. 1 H. L. 254.

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years respectively. They were much attached to each other, but they had no children.

On January 4, 1907—i.e., twenty-nine years after their marriage—the husband and wife, then aged about fifty-seven and forty-nine years respectively, made mutual wills, each giving his or her property to the other absolutely, with the same alternative provisions in case of lapse.

By his will the husband, after giving two small legacies amounting to 400*l.* and a 100*l.* life annuity which lapsed, devised and bequeathed his residuary estate, both real and personal, to his wife absolutely and appointed her sole executrix and trustee. But in case his wife should die in his lifetime or at the same time as himself the following provisions should take effect. He first appointed Anderson and Toomer executors and trustees, and gave each of them a legacy of 500*l.* He then devised and bequeathed his residuary, real and personal estate to his trustees upon trust for sale and conversion and directed them to hold the proceeds in trust for his children who should attain twenty-one in equal shares. In default of such children he gave a series of legacies to his own relatives, to mutual friends of himself and his wife, and about 6000*l.* to his wife's relatives, all nominatim. He then directed his residue to be divided into twenty parts, nineteen of which he gave to certain of his own relatives nominatim, including three to the plaintiff, leaving the remaining twentieth part to be dealt with as he should by letter or memorandum direct.

The wife's will of the same date, omitting the two small initial legacies and lapsed annuity, was an exact replica of the husband's will mutatis mutandis. The husband was sole beneficiary, executor, and trustee if he survived his wife. If he predeceased her Anderson and Toomer were to be her executors and trustees. The same provision was made for her children attaining twenty-one, and in default of such children the same legacies were given and the residue was disposed of in the same way, leaving the odd twentieth to be dealt with by letter or memorandum.

On September 9, 1914, the husband, then aged sixty-four, died without revoking the 1907 will, which was duly proved

by his wife, who after paying the funeral and testamentary expenses and debts and the two small legacies, took possession of the estate, which was sworn at 117,000*l.* odd.

On December 1, 1921, the wife, then aged sixty-four, married Oldham, who was some thirty-five years her junior.

On the same day she made a new will departing entirely from her 1907 will. She gave Oldham a life interest in a large portion of her estate, and subject thereto left it almost, if not entirely, to her own relatives.

On April 7, 1922, the wife died, and her last will was proved by the defendants, her executors thereunder, her estate being sworn at 108,000*l.* odd.

Claims being made by persons interested under part two of the mutual wills, the defendants issued an administration summons on January 23, 1923, intituled *In re Oldham. Myles* v. *Hanmer*, 1923. O. 135.

On May 14, 1923, Lawrence J. ordered the defendants to give notice to all possible claimants under part two of the mutual wills now resident in the United Kingdom, stating that the judge had directed distribution on the footing of the wife's last will, unless within six weeks of the date of the notice an action was commenced by one or more of those persons to establish a claim against the estate.

Notices were sent accordingly, and on May 24, 1923, the plaintiff, who was entitled to three-twentieths of the residue under part two of the mutual wills, commenced this action for a declaration that the defendants held the estate on the trusts of part two of the wife's mutual will of 1907.

Similar actions by other claimants under the mutual wills were also pending.

There was no evidence as to the value of the wife's estate at the date of the 1907 will, but in the above administration action the defendants stated that the whole of her property at her death, except about 10,000*l.*, was derived under her first husband's will.

Farwell K.C. and *Dighton Pollock* for the plaintiff. The mutual wills in themselves are evidence of an agreement or

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arrangement that the survivor, here the wife, who accepted the benefit thereunder, must not make a testamentary disposition of her property inconsistent with part two of her mutual will, though of course she could dispose of her whole property inter vivos, an unlikely risk neither contemplated nor provided against.

The case is analogous to a secret trust of her property at her death, as to which see *French* v. *French* (1) and *In re Gardner*. (2)

The revocation of her mutual will, though valid as a revocation, could not affect that trust if, as we contend, it existed: *In the Goods of Bailey* (3); *In the Estate of Heys*. (4)

The mutual wills without more are sufficient evidence of such an inchoate trust, which became an actual trust binding on the surviving wife when she elected to accept the benefit of the mutual will at her husband's death: *Dufour* v. *Pereira* (5), the principle of which, according to *Denyssen* v. *Mostert* (6), is wholly unshaken by *Lord Walpole* v. *Lord Orford* (7) (where the wills were only partially mutual and the implied trust was wholly uncertain) and is restated in *Stone* v. *Hoskins*. (8)

The trust was, in a sense, future, as it only bound the wife's property at her death. But there is no objection to a future trust of this nature: *Page* v. *Cox*. (9)

Luxmoore K.C. and *Gavin Simonds K.C.* for the defendants. We do not quarrel with the authorities, but they do not carry the plaintiff home.

In *Dufour* v. *Pereira* (5) Lord Camden inferred an agreement of the spouses to pool their properties into a common fund, in which each was to take a life interest with an agreed remainder over of the capital.

Is it necessary, even if possible, to infer any such agreement as to the devolution of these absolute interests? Were the

(1) [1902] 1 I. R. 172, 230.
(2) [1920] 2 Ch. 523, 530.
(3) (1861) 2 Sw. & Tr. 156, 159.
(4) [1914] P. 192, 199.
(5) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.
(6) (1872) L. R. 4 P. C. 236, 253.
(7) (1797) 3 Ves. 402.
(8) [1905] P. 194.
(9) (1852) 10 Hare, 163, 169.

provisions of part two of the mutual wills to remain unalterable by will in any event—e.g., death or bankruptcy of a beneficiary? Can the husband, aged fifty-seven, have possibly intended to bind himself to make no testamentary provision for a second wife beyond one-twentieth of his property?

So far from this being a necessary inference, it is almost inconceivable. The most probable inference is that the spouses trusted each other to deal with the property fairly and reasonably as circumstances might arise and as far as might be in accordance with each other's wishes. But that is not a definite binding trust that the Court can enforce. Indeed unless the Court is compelled to infer a trust that in no circumstances whatever were the provisions of part two of the mutual wills to be altered by the survivor's will in any respect whatever, the supposed trust is quite as uncertain and unenforceable as that in *Lord Walpole* v. *Lord Orford.* (1)

The restatement (obiter) of Lord Camden's principle in *Stone* v. *Hoskins* (2) carries the matter no further, and in *In the Estate of Heys* (3) a clear arrangement that the wills were to be irrevocable was actually proved.

Farwell K.C. in reply. It is not necessary to prove any agreement that the trusts of part two of the mutual wills were to remain unaltered, nor could such an agreement be enforced as an agreement. The wife could not have been compelled to accept her husband's estate and perform such a trust, any more than a beneficiary with a secret trust can be compelled to accept the benefit and perform the burden. The wife could have disclaimed the husband's estate and been absolutely free. But as she elected to accept it, she became bound to perform the trust implied by the mutual wills. That is a matter of law, not fact.

There is no such uncertain trust, as in *Lord Walpole* v. *Lord Orford.* (1) It clearly extends to the whole of the wife's property at her death. In these circumstances the case is covered by *Dufour* v. *Pereira* (4) and *Stone* v. *Hoskins.* (2)

(1) 3 Ves. 402.
(2) [1905] P. 194.
(3) [1914] P. 192, 199.
(4) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

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ASTBURY J. This action raises a question of more than usual interest. The plaintiff seeks to enforce what she alleges to have become an enforceable trust by reason of the making of two mutual wills by husband and wife in circumstances that I will detail.

On January 4, 1907, the husband and wife, then aged fifty-seven and forty-nine respectively, after being married twenty-nine years without issue, each made a will in substantially identical terms. The husband died on September 9, 1914, without having revoked or altered that will, which was proved by his wife, the sole executrix. The husband's estate was sworn at 117,000*l.* odd.

On December 1, 1921, the widow, then aged sixty-four, married Oldham, many years her junior, and on the same day she made a new will, and died a few months after on April 7, 1922, without revoking it. It was proved by the defendants, her executors.

There is no definite evidence as to the value of the wife's assets at the date of the 1907 will. But in an administration action of her estate the defendants stated that the whole of her property at her death, except 10,000*l.*, was derived under her husband's will. Her estate was sworn at 108,000*l.* odd.

The wife's will of 1907 was destroyed by her instructions some time after November 30, 1915, but I hold as a fact that its execution and contents have been proved by sufficient secondary evidence.

Under the joint wills of 1907, with the exception of a few small and irrelevant gifts, the husband and wife made dispositions of their property under what must in my opinion be regarded as an agreement or arrangement so to do in practically identical terms, mutatis mutandis, and I will now state the general character of these dispositions sufficiently for the purposes of this action.

In the husband's will after giving these few small and irrelevant legacies he devised and bequeathed the whole of his real and personal estate to his wife absolutely and appointed her sole executrix and trustee. But in case his wife should die in his lifetime certain subsequent provisions should take

effect. They were shortly the appointment of fresh executors and trustees, the devise and bequest to them of the whole of his real and personal estate upon trust for sale and conversion, the proceeds to be held in trust for his children attaining twenty-one, and failing such children, upon the trusts hereinafter declared. These trusts put shortly were first to provide a series of legacies, which, with the exception of two given to his executors and trustees in the event of his wife predeceasing him, were legacies to his own relatives, to mutual friends of himself and his wife, and about 6000*l.* to his wife's relatives, followed by a direction to dispose of his residuary estate in twentieths, nineteen of which he gave to his own relatives and reserved one-twentieth to be disposed of as he might subsequently direct.

The wife's will of the same date contained exactly the same devise and bequest of her real and personal estate to her husband absolutely and appointed him sole executor and trustee. She then provided that in the event of her husband predeceasing her the same two people, as in her husband's will, should be her executors and trustees. She made a similar provision for her children attaining twenty-one, and failing such children she gave similar legacies and disposed of her residue in a similar way, reserving one-twentieth to be disposed of as she might subsequently direct.

There is a certain amount of evidence as to how these two wills came to be made and signed.

On November 20, 1906, Anderson, the solicitor acting for both spouses, wrote to the husband referring to an interview and to certain instructions given by the husband as to the two proposed wills.

On November 30, 1906, the husband wrote to Anderson stating that "Toomer has consented to be executor with you for the second part of our wills. There will be 500*l.* for him also."

On December 5, 1906, the husband wrote to Anderson saying, "We have been thinking over the latter part of our wills and we think the enclosed is what we should like carried out." The enclosure dealt with certain of the dispositions.

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On December 21, 1906, the husband wrote to Anderson giving the names of certain trustees for certain beneficiaries.

On December 23, 1906, the husband wrote to Anderson saying, "In giving the name Goold Adams, I believe I wrote it Gould. It should be Goold Adams." That mistake appears in the two wills.

On January 4, 1907, a telegram was sent to Anderson asking, "Will this afternoon 3 do to sign? Weldon."

On September 11, 1913, some years after the wills were made, the husband using his wife as amanuensis wrote to Anderson saying, "I am in bed, very ill. Will you send me a copy of the first part of my will and are you quite certain that there can be no complications with persons mentioned in the second part?" No one can tell me exactly what that means.

On September 12, 1913, Anderson replied, "I am very sorry to hear you are so ill. As requested I send you a draft copy of the will and feel quite certain that there can be no complications with any one arising out of same."

That is the only evidence of the circumstances leading up to the 1907 wills, and the question is whether on that evidence and substantially from the fact that these parties agreed to make these joint wills and did so and from their contents I am entitled or bound to hold that in the event that happened of the wife surviving and proving and taking the benefit of her husband's will a trust was created which attached to the wife's property at her death and is now enforceable by the beneficiaries under part two of the wife's 1907 will.

After her husband's death the wife having acquired all his estate made certain testamentary dispositions shortly as follows:—

On September 16, 1914, a week after her husband's death, she made a will with Anderson's assistance, but there is no evidence that this will was not substantially in accordance with her 1907 will.

Anderson died in September, 1915, and on November 30, 1915, the wife made another will, which appears to have been much the same as the 1907 will, the legacies being

substantially the same and the residue still divisible in twentieths.

On February 24, 1921, the wife made another will, the residue being given in eighteenths instead of twentieths. The legacies are much the same as in the 1907 will, and one of her own relatives is given a share of residue.

On December 1, 1921, she married Oldham, and on the same day made the will of which the defendants are the executors and trustees. In this will she departed entirely from the 1907 will. She left Oldham a life interest in a large portion of her estate and subject thereto left her estate almost if not entirely to her own relatives.

The plaintiff, who is one of the husband's relatives, and entitled to three-twentieths of the residue under the wife's mutual will of 1907, claims a declaration that as the wife survived and took the benefit under the husband's mutual will, a valid trust was created under part two of her own mutual will and that her executors must hold her property upon that trust.

The case has been argued with the utmost ability on both sides.

The plaintiff admits that she cannot enforce as such an agreement made by two other persons for her benefit. She contends however that from the agreement to make these mutual wills in the form in which they were made, the survivor, who accepts the benefit under this mutual arrangement, becomes thereby subject to the alternative trusts in part two thereof. In other words she contends that under an agreement to make these mutual wills, giving similar benefits to each other in the event of survivorship, and similar alternative trusts in default of survivorship, the survivor cannot as a matter of law take the benefit and repudiate the alternative trusts mutually agreed upon. She therefore contends that on her husband's death the wife who survived had to elect whether she would take or leave the benefit under her husband's will with its resultant trust liability to perform the obligations in the way of legacies and gifts of residue appearing in part two of each will.

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There are few authorities on this subject. The principal one is *Dufour* v. *Pereira* (1), on which the plaintiff relies. The report in Dickens is short, but the case is more fully stated in Hargrave's Juridical Arguments, vol. ii., p. 304. In that case a husband and a wife who had a power to bequeath some personal property secured to her separate use made a mutual will of November 21, 1745. The residuary estate of each was pooled into one common fund and bequeathed to the survivor for life with limitations over. The wife survived, and having enjoyed the property for her life died leaving a will which disregarded the trusts of this mutual will. The beneficiaries under the mutual will filed a bill, and as Hargrave says (2), Lord Camden, after delivering an energetic and eloquent judgment, made a decree declaring that the surviving wife had bound herself to make good all the bequests in the mutual will and made an order based on that declaration. The judgment, which is very alluring, seems to have been based by Lord Camden on the fact that these two parties had agreed to pool their estates and, in consideration of the agreed benefits that the survivor was to take, to give effect to the agreement which Lord Camden apparently held they made with regard to the disposition of the capital.

Now an important point in *Dufour* v. *Pereira* (1) is that the trust of the capital which Lord Camden held to be created was rendered safe by the fact that the mutual will gave the survivor only a life interest. No difficulty arose as to the husband's rights in his wife's property under the English law then existing. The spouses lived at Geneva and apparently made their mutual will according to the local law.

Lord Camden says (3): "The instrument itself is the evidence of the agreement";—i.e., the agreement creating the trust he enforced—"and he, that dies first, does by his death carry the agreement on his part into execution. If the other then refuses, he is guilty of a fraud, can never unbind himself, and becomes a trustee of course. For no man shall deceive another to his prejudice. By engaging to do something that

(1) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.
(2) 2 Hargr. Jurid. Arg. 311.
(3) 2 Hargr. Jurid. Arg. 310.

is in his power, he is made a trustee for the performance, and transmits that trust to those that claim under him." That is all based on Lord Camden's finding of fact that a certain and unequivocal trust was agreed to and created by the two parties who executed this mutual will. It is true he came to that conclusion from the contents of the document itself, but he nevertheless bases his judgment on the fact that such an agreement was actually come to.

In *Lord Walpole* v. *Lord Orford* (1) Lord Loughborough was asked to enforce a trust very similar to that in *Dufour* v. *Pereira* (2), in which he had been counsel. The facts in *Lord Walpole* v. *Lord Orford* (1) are very complicated, but Lord Loughborough came to the conclusion that the agreement sought to be enforced as a trust was too uncertain. He thought some agreement had been made, but he was quite incapable of ascertaining its terms precisely and certainly. He assents to Lord Camden's view in *Dufour* v. *Pereira* (2), but distinguishes that case.

The plaintiff contended first that *Lord Walpole* v. *Lord Orford* (1) was not a case of mutual wills at all. It was not a case where each will gave the testator's property to the survivor. Secondly, it was not a case where the survivor took a benefit for himself under the mutual arrangement and then resiled from the burden. Thirdly, in the plaintiffs' bill the agreement was only put forward as an agreement of honour and not as a legal agreement. Fourthly, the plaintiffs claimed partly under and partly against a codicil which if *Dufour* v. *Pereira* (2) applied was wholly invalid.

In *Denyssen* v. *Mostert* (3) Sir Robert Collier says: "It may be enough to observe that, in the case of *Dufour* v. *Pereira* (2), Lord Camden held that a husband and wife, having made a mutual will, and that the wife, after her husband's death, having possessed all his personal estate, and enjoyed the interest thereof during his life, by that act bound her assets to make good all her bequests in the mutual will, and that her subsequent will, so far as it broke in upon the

(1) 3 Ves. 402.
(2) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.
(3) L. R. 4 P. C. 236, 253.

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mutual will, was void. And that, in the case of [*Lord*] *Walpole* v. *Lord Orford* (1), Lord Loughborough refused to confirm the compact of a mutual will, under circumstances," which are referred to. He goes on to cite with approval this passage from Williams on Executors, 6th ed., p. 122; 11th ed., p. 93: "Lord Loughborough, however, refused to enforce the compact of the mutual will; but this was chiefly, it seems, by reason of the uncertainty, and, in some sense, unfairness, of the compact; so that it leaves the principle of Lord Camden's decision in *Dufour* v. *Pereira* (2) wholly unshaken."

In *Stone* v. *Hoskins* (3) the headnote, which is accurate, states: "Where two persons have made an arrangement as to the disposal of their property and executed mutual wills in pursuance of that arrangement, the one of them who predeceases the other dies with the implied promise of the survivor that the arrangement shall hold good; and if the survivor, after taking a benefit under the arrangement, alters his will, his personal representative takes the property upon trust to perform the contract, for the will of the one who has died first has, by the death, become irrevocable." Sir Gorell Barnes says (4): "There remains a legal point of considerable interest. These were no doubt mutual wills made in accordance with an arrangement"—i.e., an arrangement of which the Court was satisfied by evidence. Later on he says (5): "It appears to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because, by the death of the other party, the will of that party and the arrangement have become irrevocable." That must mean an arrangement proved to the satisfaction of the Court, the terms of which are certain and unequivocal and such as the Court can see its way to enforce.

(1) 3 Ves. 402.
(2) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.
(3) [1905] P. 194.
(4) [1905] P. 195.
(5) [1905] P. 197.

Other cases have been cited, but they do not touch the question I have to decide.

The first point to determine is whether from the evidence in this case, which substantially consists only of the facts of the making of these mutual wills in the terms I have stated, I am bound or able to come to Lord Camden's conclusion in *Dufour* v. *Pereira* (1), that there was in fact an agreement or arrangement between the husband and wife that the survivor, here the wife, who was to take the other's property not for life but absolutely should if she accepted the benefit be bound not to alter the disposition in the second part of her 1907 will.

The plaintiff contends that no such arrangement need be proved outside the fact of the form of the mutual wills.

I regret that I am unable in the circumstances of this case to give effect to that contention, and all the more so because I have no doubt at all that if the husband in 1907 had foreseen that his wife after seven years of survivorship would marry a young man and leave the whole of her first husband's property to that young man and her own relatives he would have made a very different testamentary disposition.

In order to enforce the trust for which the plaintiff contends I must be satisfied that its terms are certain and unequivocal and such as in the circumstances I am bound to give effect to. What is the evidence of that ? Of course it is a strong thing that these two parties came together, agreed to make their wills in identical terms and in fact so made them. But that does not go nearly far enough. If the spouses intended to do what the plaintiff suggests, it is difficult to see why the mutual wills gave the survivor an absolute interest in the whole of the property of the one who died first.

The plaintiff says that each was satisfied to trust the other and make the arrangement only in respect of the property taken by the survivor and not disposed of in the survivor's lifetime. Now this question must be answered. Could these parties have acted as they did with any other object or intent

(1) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

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than the plaintiff asserts ? It is impossible to deny that they could. I cannot build up a trust on conjecture, and there are many reasons which may have operated on the minds of these mutual will makers. Each may have thought it quite safe to trust the other, and to believe that, having regard to their ages, nothing was likely to occur in the future substantially to diminish the property taken by the survivor, who could be trusted to give effect to the other's obvious wishes. But that is a very different thing from saying that they bound themselves by a trust that should be operative in all circumstances and in all cases. Suppose that the wife had died first, and the husband not yet sixty had remarried. It is very difficult to suppose that he agreed to a course preventing him making a testamentary provision for his second wife except as to one-twentieth of his residue. Again his own relatives to whom he wished his residue to go might, many of them, have predeceased the survivor of himself and his wife. If the plaintiff's alleged trust is operative there is no means of providing by will for such circumstances, and further I cannot help thinking that any reasonable professional man would have advised against the creation of such a trust if brought to his attention. It is difficult to imagine that when the mutual wills were made, it was intended that under no circumstances should the survivor have any power of altering the trusts except by disposition inter vivos.

Finally, I think a very great difference between *Dufour* v. *Pereira* (1) and the present case is that in *Dufour* v. *Pereira* (1) the capital of the trust property was secured in fact by the life interest only being given to the survivor, whereas in the present case the survivor is given the whole estate absolutely, and could, if so minded, dispose of the whole property inter vivos.

The defendants rightly say that the fact that the two wills were made in identical terms does not necessarily connote any agreement beyond that of so making them, and they point out that there is no evidence on which I ought to hold that there was an agreement that the trust in the mutual

(1) 1 Dick. 419; 2 Hargr. Jurid. Arg. 304.

will should in all circumstances be irrevocable by the survivor who took the benefit.

Putting it shortly I have no sufficient means for deciding with certainty what, among many possible inferences, is the sole inference that ought to be drawn from the circumstances of this case.

For these reasons, though with the utmost regret, I am bound to hold that the plaintiff has not made out her case and that her action fails.

Solicitors: *Powell, Burt & Lamaison, for Harold Marshall, Halifax; Patersons, Snow & Co.*

G. R. A.

WHITBREAD AND COMPANY, LIMITED *v.* STAINES RURAL DISTRICT COUNCIL.

[1923. W. 1968.]

Public Health—Cesspools—Local Authority undertake to cleanse—Subsequent Resolution not to cleanse—Public Health Act, 1875 (38 *&* 39 *Vict. c.* 55), *ss.* 42, 43, 44.

A local authority having undertaken, under the powers conferred on it by s. 42 of the Public Health Act, 1875, to cleanse the cesspools in its district or part of its district, can absolve itself by resolution from continuing the duty of cleansing such cesspools.

In 1903 the defendants, in pursuance of s. 42, voluntarily undertook the cleansing of cesspools in part of their district. On June 26, 1917, they passed a resolution rescinding all former resolutions with regard to the cleansing of cesspools throughout the whole or any part of their district. The plaintiffs brought an action claiming a declaration that the defendants were bound to continue to cleanse the cesspools at such times and intervals as might be reasonably necessary:—

Held, that a local authority, which has undertaken the work of cleansing cesspools within the meaning of s. 42, is at liberty at any time thereafter to cease to undertake such work.

IN 1903 the defendants, in pursuance of s. 42 of the Public Health Act, 1875, voluntarily undertook the cleansing of cesspools for the part of their district known as the parish of Ashford, subject to the right to make certain charges in connection with such cleansing. The plaintiffs were the owners

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of six houses in Ashford, which, until the year 1910, were drained into six separate cesspools. In 1910 the defendants requested the plaintiffs to drain all their houses into one large cesspool. Accordingly a large cesspool was constructed under the supervision of one of the defendants' sanitary inspectors, and all the six houses had since been drained into it. On June 26, 1917, the defendants passed the following resolution: "That, having regard to the shortage of labour, plant and materials due to the war, all former resolutions with regard to cleansing of cesspools throughout the whole or any part of the district be rescinded, and that the surveyor be empowered to arrange with individual householders for the use of the Council's engines, materials and apparatus for this purpose, provided that no part of the cost thereof shall fall upon the rates of the district or any contributory place therein." On September 1, 1917, the defendants inserted in a newspaper circulating in the neighbourhood a notice setting out the above resolution, and stating that householders should make application to the surveyor for information as to the facilities which could be granted by the defendants during the continuance of the war, and until the re-establishment of normal conditions. The notice further stated that the resolution to rescind would take effect as from September 30. On January 6, 1919, the plaintiffs, by their surveyor, made a request in writing to the defendants to cleanse the cesspool at the plaintiffs' cost, and this was done until June, 1923. On March 28, 1923, the defendants served on the plaintiffs' agents a notice alleging that a nuisance existed at their premises arising from the cesspools and drains being foul and in such a state as to be a nuisance or injurious to health, and they required the plaintiffs to provide other additional and sufficient covered cesspool accommodation for sewage matter on the premises. The plaintiffs alleged that the nuisance complained of was due to the failure of the defendants to cleanse the cesspool at such times and intervals as were reasonably necessary, and their agents, by letters dated April 16 and 23, 1923, required the defendants to cleanse the cesspool at such times and intervals as might be reasonably

necessary, but the defendants by letters dated April 20 and 24 denied that there was any obligation upon them to cleanse the cesspool, and refused so to do. In the action the plaintiffs claimed a declaration that the defendants were bound at their own cost to cleanse the cesspool at such times and intervals as might be reasonably necessary, and they also asked for an order upon the defendants to so cleanse the cesspool.

Macmorran K.C. and *E. J. Naldrett* for the plaintiffs. The question in this case turns on the meaning of ss. 42–44 of the Public Health Act, 1875. (1) The defendants, having undertaken under the terms of s. 42 to cleanse the cesspools, cannot absolve themselves from carrying out their undertaking. If they fail to carry out their undertaking they are liable to fines under s. 43. They may have an excuse if the requirement to cleanse is unreasonably frequent: *Leck* v. *Epsom Rural Council*. (2) The plaintiffs say the defendants are bound to cleanse reasonably, and they are asking for an order upon them to so cleanse the cesspools.

Hughes K.C. and *R. A. Glen* for the defendants. There is nothing in ss. 42, 43 or 44 which says that a local authority, having once undertaken to cleanse cesspools, is bound to continue doing so for ever, no matter what circumstances may

(1) Public Health Act, 1875, s. 42: "Every local authority may, and when required by order of the Local Government Board shall, themselves undertake or contract for . . . . the cleansing of earthclosets privies ashpits and cesspools; either for the whole or any part of their district. . . . ."

Sect. 43: "If a local authority who have themselves undertaken or contracted for . . . . the cleansing of earthclosets privies ashpits and cesspools fail, without reasonable excuse, after notice in writing from the occupier of any house within their district requiring them to . . . . cleanse any earthcloset privy ashpit or cesspool belonging to such house . . . . to cause the same to be . . . . cleansed . . . . within seven days, the local authority shall be liable to pay to the occupier of such house a penalty not exceeding five shillings for every day during which such default continues after the expiration of the said period."

Sect. 44: "Where the local authority do not themselves undertake or contract for . . . . the cleansing of earthclosets privies ashpits and cesspools belonging to any premises, they may make by-laws imposing the duty of such cleansing . . . . at such intervals as they think fit, on the occupier of any such premises. . . . ."

(2) [1922] 1 K. B. 383.

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arise. To cast such a burden on a local authority would obviously be wrong. A local authority can always rescind an undertaking to cleanse cesspools. This was evidently the view taken by Avory J. in *Leck* v. *Epsom Rural Council*. (1)

Macmorran K.C. in reply. The defendants served nuisance notices on the plaintiffs under ss. 91 and 94 of the Public Health Act, 1875. This they were not entitled to do, as their statutory obligation to cleanse was still in existence, and is in existence to-day. [He referred to *Pasmore* v. *Oswaldtwistle Urban Council* (2); *Baron* v. *Portslade Urban Council* (3); *Pegg and Jones, Ld.* v. *Derby Corporation* (4); and *Fordom* v. *Parsons*. (5)]

ROMER J. This case raises a short though somewhat important point under ss. 42, 43 and 44 of the Public Health Act, 1875—a point on which there is apparently no direct authority. The point arises in this way. The defendants, who are the Rural District Council of Staines, in May, 1903, came to the conclusion that they would undertake the task of cleansing cesspools for that part of the district that is situated in the parish of Ashford. They had power to do so under s. 42. Due notice of their determination was given by them in the local press. From that time onward and down to September, 1917, the cleansing of cesspools in that part of their district was carried out by the defendants. On June 26, 1917, the defendant Council passed the following resolution. [His Lordship read the resolution, and referred to the advertisement in the local newspaper, and continued :] The point which I have to determine is whether the defendant Council, having undertaken the task of cleaning the cesspools in 1903, could in 1917 absolve themselves by resolution from the duty of cleaning the cesspools further.

The determination of the question depends on the true construction of three sections of the Act of 1875. [His Lordship read s. 42.] Now in my opinion the word "under-

(1) [1922] 1 K. B. 391.
(2) [1898] A. C. 387.
(3) [1900] 2 Q. B. 588.
(4) [1909] 2 K. B. 511.
(5) [1894] 2 Q. B. 780.

take " in that section does not refer to any undertaking or promise given by a local authority to any other body of persons to do any part of the work specified in the section, but refers merely to the performance of that work. Except in the case where an order of the Local Government Board is obtained, the section is nothing more than an enabling section authorizing the local authority to do themselves or through contractors appointed by them certain work, which but for the section the local authority would have no power to do at all. That being so, I cannot so far see any reason for coming to the conclusion that the Council of the local authority, when once it has determined to do any of the work, is bound to do it in perpetuity, and that it has no right at a subsequent date to discontinue to do so if it so thinks fit. It is true that the section does not contain such words as " from time to time," but in an enabling section like this I think these words are necessarily implied. It could hardly be contended, for instance, that the power to make by-laws conferred by s. 43 is one that has to be exercised once and for all time.

But now I have to deal with s. 43. [His Lordship read the section.] It is said by the plaintiffs that the defendants having undertaken the task of cleansing the cesspools in 1903, are therefore a local authority " who have themselves undertaken . . . ." the cleansing of cesspools, and, accordingly, that there is an obligation imposed upon the defendants by this section which lasts for ever, and which cannot be got rid of. The section does not expressly impose any obligation to do any of the work referred to in the section, but it would seem to impose an obligation by implication, because it makes the authority liable to a penalty in certain events for failure to do the work. For myself, however, I think that the section does not mean what the plaintiffs say it means. I think the section is only intended to apply where the local authority are undertaking in their district or part of their district, as the case may be, the work which in the case of some particular house has not in fact been done, and that the local authority is not brought within the section merely because at some past date it had undertaken similar work, if it is not undertaking

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that work at the time in question. I think it must be ascertained whether at the time of failure to do the work in the particular case the local authority are or are not still undertaking the work in their district or part of their district, as the case may be. That this is so is, I think, confirmed by s. 44, which would seem to be intended to apply, so far as the cleansing of cesspools is concerned, to all cases not covered by the preceding section, and in s. 44 the words are, " Where the local authority do not themselves undertake a contract for . . . . the cleansing of cesspools." In my opinion s. 43 applies only to cases where the local authority do undertake the work at the time in question.

For these reasons, on giving the matter the best consideration I can, it appears to me that there is nothing in any one of these sections preventing a local authority which has once undertaken the task of cleansing cesspools from subsequently relieving themselves of the obligation. I think that this view is in accordance with the opinion expressed by Avory J. in his judgment in *Leck* v. *Epsom Rural Council*. (1)

In that case the local authority had for some years before April 28, 1920, in fact cleansed cesspools in their district, and, as pointed out by McCardie J. in his judgment, they might therefore be said to have undertaken that work within the meaning of s. 42 of the Act, it not being necessary for the authority to pass an express resolution to do the work if in practice they had so acted as to show that they had resolved to do it. But by a resolution dated April 28, 1920, it had been resolved that any resolution or resolutions adopting s. 42 of the Act so far as related to the cleansing of cesspools should be rescinded, and that any resolution or resolutions imposing any obligations or duty on the authority in respect of the cleansing of cesspools in the district should be also rescinded. On August 4, 1920, a notice was given to the plaintiff in the case that the authority could only empty cesspools once in every three months, and the plaintiff having subsequently to that date required the authority to empty his cesspool before the expiration of three months since it was last

(1) [1922] 1 K. B. 383.

emptied, and the authority having failed to comply with his requirement, the question to be decided was as to whether the authority were liable for the penalty imposed by s. 43. The decision of the Divisional Court was to the effect that, whether in the circumstances the authority had or had not undertaken the work, it had a reasonable excuse within s. 43 for not having complied with the plaintiff's requirement. The point that I have to decide did not therefore arise. In the course of his judgment, however, Avory J. expressed himself as follows (1): "The appellant's complaint was made under s. 43, and to establish it it was necessary to say that the respondents had themselves undertaken the cleansing of cesspools. In the circumstances of this case I think it is open to argument whether the respondents had undertaken the cleansing of cesspools. It is clear that after the passing of the resolution of April 28, 1920, they were not such a local authority, because they then resolved not to undertake the duty, and the result was that thereafter it became the duty of every occupier to cleanse his cesspool. Then upon August 4, 1920, the respondents' surveyor, with their authority as we must assume, sent out a notice that in the future they would empty cesspools every three months, and if they were requested to do so oftener the cost of doing the work must be paid by occupiers. I quite appreciate Mr. Macmorran's argument that a local authority which undertakes the duty of cleansing cesspools must undertake the whole duty; they have no right to undertake the duty with limitations upon it. I am not satisfied that on August 4, 1920, the respondents, by their notice, were undertaking the duty within the meaning of the statute of cleansing cesspools. It is not necessary, however, to decide this." From this passage I understand Avory J. to have been of opinion that, even if before April 28, 1920, the defendants were an authority who had undertaken the cleansing of cesspools, yet after that date they were no longer such an authority. He seems therefore to have been of opinion that a local authority which has once undertaken the work within the meaning of s. 42 is at liberty at any time

(1) [1922] 1 K. B. 383, 390.

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thereafter to cease to undertake such work. This is the view that I have myself formed, and I am accordingly of opinion that the action fails.

Solicitors for the plaintiffs: *Martineau & Reid.*

Solicitors for the defendants: *Peter Thomas & Clark, for Horne, Engall & Freeman, Staines.*

P. J. B.

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[1923. R. 2277.]

Specific Performance—Landlord and Tenant—Lease of a Flat—Oral Contract—Statute of Frauds—Part Performance.

The defendant entered into an oral contract with the plaintiff to take a lease of a flat. It was agreed that certain alterations should be made to the flat. During the progress of the alterations the defendant frequently visited the flat and made suggestions for further alterations, which were carried out by the plaintiff at her request. She subsequently repudiated the contract. In an action for specific performance she relied on the Statute of Frauds as a defence:—

Held, that the acts done by the plaintiff at the request of the defendant were acts of part performance taking the case out of the Statute of Frauds, and that the plaintiff was entitled to judgment for specific performance.

Dickinson v. *Barrow* [1904] 2 Ch. 339 considered and explained.

TRIAL OF ACTION WITH WITNESSES.

The following statement of the facts is taken from his Lordship's considered judgment.

In this case the plaintiff seeks specific performance of a contract by the defendant to take a lease from the plaintiff of a flat situate on the ground floor east of a house known as South Lodge, Ham Common, for a term of twenty-one years from August 6, 1923. The defendant denies that there was any such contract in fact, and, alternatively, she says that if there were any such contract it was made expressly subject to a condition that the flat should be ready for occupation by the defendant on August 6, which date was subsequently by mutual agreement extended to August 23, 1923. The defendant further pleads the Statute

of Frauds as affording a defence to the action, there being, as she alleges, and alleges rightly, neither a contract in writing nor a sufficient written memorandum of any contract within the statute. In reply to this last allegation the plaintiff contends that there are in this case acts of part performance on the part of the plaintiff sufficient to take the case out of the statute. Both the plaintiff and the defendant have given evidence in the case and there is a good deal of discrepancy between the stories told by them respectively, but, after having seen both the parties in the witness box, I have no hesitation in accepting the evidence of the plaintiff in preference to that of the defendant on all material matters as to which they are at issue. In these circumstances I find the facts to be as follows :—

The plaintiff for some little time before the month of July, 1923, was engaged in converting South Lodge, of which she was the owner in fee simple, into residential flats, and for that purpose had employed a builder of the name of Hammond. South Lodge was a house of two stories containing exceptionally large rooms, and consisted of two wings which have been referred to as the east wing and the west wing respectively, the house apparently facing due south. By the beginning of July, 1923, the reconstruction of the west wing was practically complete, the plaintiff having converted the ground, first, and second floors into flats. Her intention was to convert the east wing substantially in the same manner as that in which she had converted the west wing. Had she done so, the flat on the ground floor, east, would have contained, in addition to other accommodation, two good-sized rooms at the south end with windows opening on to the front of the house, and a bathroom situated towards the north end of the flat on the west side of a passage leading to some bedrooms at that end. Between these bedrooms and the front rooms there was to be a large lounge hall with a kitchen opening out of it, and the flat generally was to have been constructed in accordance with a plan which was produced at the trial and marked GR2, though it seems probable that that particular plan was a plan of the first floor, east. This, however, for the purposes of the case is immaterial.

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In these circumstances on July 2, 1923, the defendant visited South Lodge and saw Mr. Hammond. She appears to have ascertained from him the rent that was being asked by the plaintiff for the ground floor, east, flat, but nothing material took place on that occasion. On the same day she wrote to the plaintiff a letter stating that she would call upon the plaintiff the following day. She accordingly called to see the plaintiff at the plaintiff's residence in Richmond on July 3 or 4, but did little more on that occasion than obtain from the plaintiff confirmation as to the rent which the plaintiff was asking for the flat in question. On July 5 the plaintiff took the defendant and the defendant's husband to South Lodge. At this interview the plaintiff showed the defendant the flat on the first floor, west, and told her that she intended to construct a flat on the ground floor, east, on substantially the same lines. The plaintiff informed the defendant of the rental she was asking, which was 160*l.* a year with an additional rent of 25*l.* a year towards the maintenance of the front garden and the public part of the building, such as the halls, corridors, staircases, etc., and the fuel used for the supply of hot water. The defendant, however, intimated that she would prefer one of the rooms that were to face south to be divided by a partition into two rooms, though the particular room so to be divided was not apparently settled definitely on this occasion. The additional cost incurred by reason of the partition required by the defendant was to be paid by her. The plaintiff further explained to the defendant the scheme of decoration that she contemplated, which the plaintiff intended should be the same all over the building, and in particular showed her the types of grates that she intended to put in the several rooms. The plaintiff also explained that there would be included in the lease of the flat a small garden on the north. The defendant then asked the plaintiff how long it would take to complete the flat and the plaintiff, after consulting with Hammond, who told her that the work could be done in a month, informed the defendant that it would be ready by August 6. The parties then adjourned to the plaintiff's house in Richmond, where they had tea. A discussion took place there as to the total

yearly expenditure in which the flat would involve the defendant in respect of rent and the rates, which it was agreed the defendant should pay. As the defendant was leaving the house, after some little consultation with her husband, which could not be heard by the plaintiff, she asked her husband if it would be all right. He replied in the affirmative, and thereupon the defendant said that she would take the flat for twenty-one years from August 6. On July 6, 1923, the defendant wrote a formal letter to the plaintiff, as she had agreed to do on the previous day. That letter is as follows :—

"DEAR MRS. RAWLINSON,

I am prepared to take the flat agreed upon, on the ground floor Sutton House, at a rental of 160*l.* a year for twenty one years.

My bankers address, the Manager, Barclay's Bank, Ltd. (137 North End Road) West Kensington Branch, W. 14.

I will sign the agreement when it is ready and go into any necessary details upon hearing from you.

Yours very truly,

(Sgd.) ADA AMES."

It is admitted that the name "Sutton House" in that letter is a mistake for South Lodge and nothing turns upon that. The "agreement" referred to was the lease. But the defendant did not anticipate any difficulty over this, nor did she think that there were any further details to be discussed beyond some comparatively trivial matters, such as decoration.

It is, however, to be observed that the date from which the term of twenty-one years was to run is not mentioned in that letter, nor indeed is it to be found in any subsequent document. For this reason alone it is not possible for the plaintiff to produce any memorandum sufficient to satisfy the Statute of Frauds. I find, however, as a fact that on July 5 the defendant intended to and did definitely agree with the plaintiff to take a lease of the flat for a term of twenty-one years from August 6 at a rental of 160*l.* a year with an additional yearly rental of 25*l.* for the purposes I have mentioned. There was no doubt or

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uncertainty as to what the flat was. It was the ground floor, east, of South Lodge altered in the manner shown upon the plan GR2, except that one of the south rooms to be selected by the defendant was to be divided by a partition into two, the cost of such partition being borne by the defendant. I am satisfied that this contract was in no sense conditional upon the flat being ready by August 6. It was no doubt contemplated by both parties that the flat would in fact be ready by then, and that, no doubt, was the reason why the term was to begin on the same date. Even if the plaintiff had definitely contracted to have the flat ready by August 6, which she did not, time in this respect was not of the essence of the contract. In point of fact the flat could easily have been completed before the date in question had not the defendant subsequently induced the plaintiff to make various and substantial alterations in the method of conversion which the plaintiff had intended originally to adopt.

On Saturday, July 7, 1923, the plaintiff wrote to the defendant as follows :—

"I am enclosing a formal acceptance of your offer for the flat which we will start at once (Monday morning) to construct. I see in to-day's local paper that the Richmond rates have gone down 7*d.* in the £ so no doubt Ham will follow suit."

The formal acceptance enclosed was as follows :—

"DEAR MRS. AMES,

I accept your offer of 160*l.* (one hundred and sixty pounds) a year for the ground floor east flat of the main building at South Lodge Ham Common for 21 years subject of course to your paying the rates as agreed and 25*l.* yearly towards the maintenance of the front garden, the public part of the building that is the corridors, halls, staircases, etc., and the fuel used for the supply of hot water and subject also to the references being satisfactory."

The references were satisfactory, and there seemed to be no reason why the whole matter should not be completed and the lease signed within a few days. The work of reconstruction too could have been begun on the 9th as stated in the letter.

The defendant, however, by July 8 had come to the conclusion that the method of conversion determined upon by the plaintiff and explained by the plaintiff to the defendant was capable of improvement. She accordingly prepared a rough sketch of how the flat might be arranged and sent it to the plaintiff in a letter of July 8, 1923. That letter so far as material was in these terms :—

"DEAR MRS. RAWLINSON,

I am quite willing to accept the terms of your letter re ground floor East Flat and I will try to be at Sutton Lodge Ham to-morrow afternoon about 4 o'c. and if I could see the plan of the flat I could judge better where I would like the partitions put, if it is possible I would like the kitchen door to open into the passage of the flat to make it possible to answer the front door of the flat without going into the lounge dining room first.

By the way do you think it practical to put the second W.C. outside close to soil pipe and the piece of trellis to divide it from the staircase to the flats above.

I enclose a rough sketch (not to scale) of how I imagine it might be arranged but you will be able to tell me what you think of the suggestion when you see me. Mr. Ames would like a bedroom and dressing room and study, and I would like a bedroom and small sitting room, near I think, the kitchen, then there would be a maid's room and spare bedroom for a friend when necessary leaving plenty of space for a nice larder, cupboard for china, and one for linen and a box room.

I shall be staying at the above address for the next fortnight—some friends have lent me their house for the time they are away.

I am glad to hear the Richmond rates are lower—thanking you for your kindness in troubling so much.

Yours faithfully,

(Sd.) ADA AMES."

The rough sketch enclosed in this letter is exhibit GR1. It indicated a method of conversion differing in material respects from that originally agreed upon between the plaintiff and the

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defendant, of which the following are the most important. Both of the rooms on the south were to be partitioned instead of one only, the bathroom was to open out of and could only be approached through the kitchen, and the kitchen itself was to be entered from the main entrance passage of the flat instead of from the lounge. The plaintiff, though apparently anxious to meet the defendant's wishes in all respects, was doubtful about the feasibility of some of the defendant's proposals and accordingly after seeing Mr. Hammond wrote her a letter as follows :—

"DEAR MRS. AMES,

I was sorry I could not manage to be at South Lodge yesterday to meet you but I shall be there to-morrow at 5 o'clock if you could manage to be there, or we could appoint some other time. There are one or two things I want to discuss with you which are better explained on the spot. You would not notice perhaps that we have removed several walls from the centre of the building to form the hall and staircase and I am a little nervous about weakening the main wall of the corridor by cutting away any more support (brickwork) from this particular wall as this takes the weight of the two upper floors and part of the roof, that is why we planned a lounge hall to this flat. The plan for this flat was similar to the one overhead with the exception of the extra room where the staircase comes up. This comprises six rooms kitchen bathroom extra W.C., etc. These I can vary of course exactly as you wish and any additional rooms or work I will undertake to get done for you at cost price. I gather from your plans you wish for four rooms in front instead of two. I will find out exactly what the extra rooms will cost and let you know. If you cannot manage the appointment to-morrow will you write and appoint a time. In any case I shall be there at 5 to-morrow (Wednesday).

Yours very truly,
(Sd.) G. RAWLINSON."

The sketch itself was handed over by the plaintiff to Mr. Hammond. On July 11 the defendant went to the flat

and saw Mr. Hammond and a Mr. Collins the district surveyor. There were certain of the defendant's proposals that Mr. Collins would not pass, and accordingly he and the defendant went round the premises and agreed on certain modifications. The plan of conversion as so modified is indicated on the exhibit GR3. So far, however, as the three important matters referred to above were concerned, the plan is more or less identical with the rough sketch of the defendant. After this there was an interview between the plaintiff and the defendant, the date of which the plaintiff could not fix precisely, but which must have been on July 11, at which the plaintiff assented to the modifications of the original scheme that had been arranged between the defendant and Mr. Collins, the defendant agreeing to pay for the partitioning of the two front rooms into four. With this exception the contract concluded on July 5 remained unaffected. On the same day—namely, July 11—the work of reconstruction in accordance with the modified plan was begun by Mr. Hammond and proceeded uninterruptedly down to August 27. During the whole of this period, with the exception of a few days in July, when she was ill, the defendant was in more or less constant attendance at the flat. During the progress of the work she from time to time made requests to the plaintiff to vary the scheme of decoration and fittings that the plaintiff had intended, and the plaintiff from time to time acceded to these requests. The defendant, for instance, obtained the plaintiff's consent to the substitution of a red-brick fireplace in at least one of the rooms for the grate intended by the plaintiff. The plaintiff also agreed to provide an Eagle cooking stove in the kitchen and a carved wood surround to the window in the lounge. Considerable difficulty was experienced in obtaining the red bricks for the fireplace, but eventually a firm was found at Kingston that could supply them, and the defendant herself took an active part in obtaining them. She visited the firm in question and obtained sample bricks. The order for the bricks was, of course, given by the plaintiff. It should be added that this substitution of bricks for an ordinary grate involved the employment of special bricklayers. In addition to all this the defendant was busy

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making suggestions to the workmen, and on at least two occasions actually gave them orders as to what they were to do. She assumed to herself the right to decide as to the position of the partitions in the two south rooms and as to the position of the electric lights. Mr. Hammond, who was an excellent witness and whose evidence I accept without hesitation, said that the defendant took weeks before she settled upon the actual position of the partitions in the most westerly of the two south rooms. He added that she came round talking about what she would have and would not have and that she was undecided as to the position of the electric lights. The defendant herself deposed to a conversation that she had with the electrician. She said, "I told the electrician on one occasion that I wanted wall plugs. He said I couldn't as the flat had been wired overhead. I said, 'Where are you putting the switches?' He said, 'Where do you want them?' I said, 'In the usual place.' I said, 'Couldn't you put the plugs above the switches as I have bought my fittings to attach to plugs?'" Then on some date in August she ordered two of the workmen to bring down some blue tiles from a grate in another flat. She said that they were for Mr. Ames's bedroom, and added that she had bought blue rugs to go with the grate. On another occasion she gave instructions to a workman to scrape off the white paint from a mantelpiece. The plaintiff does not seem to have objected in any way to the flat being constructed and decorated in accordance with the defendant's wishes, nor was there any particular reason why she should have done so seeing that there was a binding contract by the defendant to take the flat. She did however on one occasion ask the defendant not to give orders to the workmen directly, but to come to the plaintiff when she desired things done, as otherwise unnecessary delay was caused.

In these circumstances it is not surprising that the work was not completed by August 6. The alterations suggested by the defendant in her rough sketch and the subsequent alterations suggested by her, combined with the delay caused by her inability to make up her mind as to the partition in the west room, all added materially to the time occupied by the work.

According to the defendant and her witness Mrs. Davis, however, the plaintiff promised on August 10 that the flat should be ready on the 16th, and on August 15 finally promised it for August 23. This is denied by the plaintiff. I do not think that she ever pledged herself to this extent, though it is probable that she expressed herself as being confident that the flat would be ready on the dates named. For it is admitted by the defendant and Mrs. Davis that the plaintiff refused to make any promise in writing, and the state of things at the flat was such that it would have been the height of imprudence for the plaintiff to bind herself in any way. It is said by the defendant and Mrs. Davis, but denied by the plaintiff, that on August 15 the defendant stated that unless the flat was ready by August 23 she would decline to take it. But even if this were so it was not competent to the defendant at this stage and in the existing circumstances to impose any such condition. Although in point of fact the flat was nearly completed by August 23, it was not on August 15 reasonable to expect that it could be completely finished so soon, especially having regard to the fact that the delay in completion was due to the acts of the defendant herself.

In the meantime the draft lease had been prepared by the plaintiff's solicitors and various alterations therein had been made on the defendant's behalf, some of which were assented to on behalf of the plaintiff. That there should have been negotiations between the solicitors as to the form of the lease was of course to be expected, but these negotiations cannot affect the matter if there was, as I have already held to be the case, a concluded agreement between the parties: see *Perry* v. *Suffields, Ld.* (1)

In point of fact there was very little arising on the lease as to which the solicitors were not in agreement.

On August 27, however, the defendant's solicitors wrote to the plaintiff's solicitor a letter in the following terms:—

"We duly received your letter of the 20th inst. returning the proposed draft lease as revised by you in orange coloured ink and we have seen our client again thereon. She cannot

(1) [1916] 2 Ch. 187.

ROMER J. however agree to the terms of the lease, and she also finds from enquiries she has made through your client's builders that the flat would not be ready for occupation until about the last week in September and that therefore under all the circumstances she declines to proceed further in the matter or to take up the lease the draft of which we now return herewith."

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In reply to this the plaintiff's solicitor wrote as follows :—

"17, The Green,
Richmond, Surrey.
30*th August*, 1923.

DEAR SIRS,

South Lodge, Ham Common.
Rawlinson & Ames.

In reply to your letter of the 27th inst., particularly in view of the large amount of additional work which my client has carried out at your client's request, she cannot see her way to releasing your client from her contract to take the lease. I fear the suggestion for a release is most unreasonable, the whole scheme of the flat having been altered, 9 rooms provided instead of 6, and special grates fitted. I am to inform you however that the flat can be ready in 14 days' time.

It does not appear to me that the orange alterations which I made in the draft are of a very serious nature, but if it will meet your requirements my client will be satisfied with the clause which provides for the flat to be handed over in the same repair and condition as it now is, leaving out altogether the words 'sufficient' or 'substantial.'

Yours faithfully,
(Sd.) C. H. E. SMITH."

In making the statement in this letter that the flat could be ready in fourteen days' time the plaintiff's solicitor was, I think, acting ex abundanti cautela. I accept the evidence of Mr. Hammond and the workman Mr. Cox that by August 27 there was very little left to be done to make the flat complete. Mr. Thomas Henry Smith, a surveyor called on behalf of the defendant, who inspected the flat on October 16, 1924, said

that three days' more work would put matters right and, so far as the evidence before me goes, nothing further was done to the flat after August 27, when the defendant repudiated her contract.

Manning K.C. and *W. F. Waite* for the plaintiff. The alterations required by the defendant made it quite impossible for the flat to be completed by the date from which the lease was to commence. The mere fact that there was some delay in completing is not a ground on which the defendant is entitled to repudiate the verbal agreement which was entered into on July 5. The acts of the plaintiff, in complying with the requests of the defendant in respect of the alterations, constitute sufficient part performance on the part of the plaintiff to prevent the defendant from relying on the Statute of Frauds as a defence: see Fry on Specific Performance, 6th ed., p. 280. On the question whether acts done by an owner on his own property can constitute part performance, see *Dickinson* v. *Barrow*. (1) The facts in that case are very like those in the present case. In that case the judge did not find that the defendant gave any orders. In the present case, however, orders were given by the defendant. Such part performance has been shown as is sufficient to take this case out of the statute.

Hughes K.C. and *Cleveland-Stevens* for the defendant. Having regard to the agreed facts and the correspondence, it is clear that no verbal contract was entered into on July 5 or on any other date. As to the Statute of Frauds there is a complete answer to that point. There was no memorandum in writing. While expenditure by a stranger obviously may create a contract, expenditure by the owner does not imply any contract. There is nothing in the present case to indicate any contract. The object of the Statute of Frauds was to prevent disputes as to verbal negotiations. The Court has broken in upon the statute to the extent that if an Act is found which is specially referable to a contract the necessity for a memorandum is got rid of. Counsel for the plaintiff has

(1) [1904] 2 Ch. 339.

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not found any case, with the exception of *Dickinson* v. *Barrow* (1), indicating that expenditure by an owner has been regarded as an act taking the matter out of the Statute of Frauds. The cases of *Dickinson* v. *Barrow* (1); *Caton* v. *Caton* (2); and *McManus* v. *Cooke* (3) support the contention that part performance by the party to be charged will not take the case out of the statute. In Fry on Specific Performance, 6th ed., pp. 279 and 280, the law is stated.

The limitations of the nature of the doctrine as to part performance are clearly indicated in the judgments of Lord Selborne in *Maddison* v. *Alderson* (4) and of Cotton L.J. in *Britain* v. *Rossiter*. (5) See also the passage in *Caton* v. *Caton* (2) referred to by Kay J. in *McManus* v. *Cooke* (6) and by Kekewich J. in *Dickinson* v. *Barrow*. (7) In *Buckmaster* v. *Harrop* (8) Sir William Grant M.R. puts forward the view that the party seeking performance must show performance on his side. It is not inconsistent for a person having no contract to make alterations to the property. Suppose there was an agreement that, if the plaintiff would make such alterations as the defendant wanted and if they could agree on the proper form of lease, the defendant would take the flat—the acts of the defendant in the present case would be perfectly consistent with that position. The arrangement merely was that, if the place suited her, she would take it.

Manning K.C. in reply. In *Dickinson* v. *Barrow* (1) Kekewich J. in effect said that the acts of part performance were done under the control and supervision of third parties. The act of the third parties makes the acts of the plaintiff unequivocal.

[ROMER J. I must find some act of the plaintiff, if the defendant is to be prevented from relying upon the Statute of Frauds. I think it is necessary here to find some equity arising out of some expense incurred by the plaintiff. In

(1) [1904] 2 Ch. 339.
(2) (1866) L. R. 1 Ch. 137.
(3) (1887) 35 Ch. D. 681.
(4) (1883) 8 App. Cas. 467, 475.
(5) (1879) 11 Q. B. D. 123, 130.
(6) 35 Ch. D. 681, 693.
(7) [1904] 2 Ch. 339, 343.
(8) (1802) 7 Ves. 341, 346.

Dickinson v. *Barrow* (1) Kekewich J. never directly referred to acts of the plaintiff at all.]

Kekewich J. must have meant that the acts of the defendants made the acts of the plaintiff unequivocal. The present case is analogous to *Dickinson* v. *Barrow* (1) from that point of view.

Cur. adv. vult.

Nov. 7. ROMER J. [after stating the facts as above set out, continued]: In these circumstances, and there being an unconditional verbal contract by the defendant to take a lease of the flat in question, and the plaintiff having been at all times ready and willing to perform such contract, the defendant has not in my opinion any valid defence to the action for specific performance unless it be the defence of the Statute of Frauds. Whether this is or is not a good defence depends upon the question whether there are here sufficient acts of part performance to take the case out of the statute.

It is not very easy to ascertain from the authorities earlier than the case of *Maddison* v. *Alderson* (2) what precisely was the ground of the equitable doctrine as to part performance. For instance, in *Caton* v. *Caton* (3) Lord Cranworth says this: "The ground on which the Court holds that part performance takes a contract out of the purview of the Statute of Frauds is, that when one of two contracting parties has been induced, or allowed by the other, to alter his position on the faith of the contract, as for instance by taking possession of land, and expending money in building or other like acts, there it would be a fraud in the other party to set up the legal invalidity of the contract on the faith of which he induced, or allowed, the person contracting with him to act, and expend his money." If this were the sole ground, then any act on the part of one of two contracting parties which altered his position on the faith of the contract would be sufficient to prevent the other party from setting up the statute, whether the act was or was not one that indicated the existence of some such contract as

(1) [1904] 2 Ch. 339. (2) 8 App. Cas. 467.
(3) L. R. 1 Ch. 137, 148.

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alleged. Lord Cranworth, indeed, added: "If I agree with A., by parol, without writing, that I will build a house on my land, and then will sell it to him at a stipulated price, and in pursuance of that agreement I build a house, this may afford me ground for compelling A. to complete the purchase, but it certainly would afford no foundation for a claim by A. to compel me to sell on the ground that I had partly performed the contract."

It is to be observed that in the example which the Lord Chancellor gives the act of A. in completing a house on his own land is not such an act as necessarily to suggest the existence of a contract affecting the land. The objections to this explanation of the principle were accordingly pointed out by Cotton L.J. in *Britain* v. *Rossiter* (1) in these words: "Let me consider what is the nature of the doctrine as to part performance. It has been said that the principle of that doctrine is that the Court will not allow one party to a contract to take advantage of part performance of the contract, and to permit the other party to change his position or incur expense or risk under the contract, and then to allege that the contract does not exist; for this would be contrary to conscience. It is true that some dicta of judges may be found to support this view, but it is not the real explanation of the doctrine, for if it were, part-payment of the purchase-money would defeat the operation of the statute. But it is well established and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th section. What can be more contrary to conscience than that after a man has received a large sum of money in pursuance of a contract, he should allege that it was never entered into? The true ground of the doctrine in equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would, prima facie, make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a

(1) 11 Q. B. D. 123, 130.

contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken."

If, however, this passage be regarded as stating the whole of the doctrine it would seem to follow that any act which afforded strong evidence that a contract existed could be relied upon by a plaintiff in an action for specific performance, even though the act were the act of the defendant alone and was not one which created an equity in the plaintiff's favour by reason of his having changed his own position. But in *Maddison* v. *Alderson* (1) Lord Selborne stated the law as follows: "In a suit founded on such part performance, the defendant is really 'charged' upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. If such equities were excluded, injustice of a kind which the statute cannot be thought to have had in contemplation would follow. Let the case be supposed of a parol contract to sell land, completely performed on both sides, as to everything except conveyance; the whole purchase money paid; the purchaser put into possession; expenditure by him (say in costly buildings) upon the property; leases granted by him to tenants. The contract is not a nullity; there is nothing in the statute to estop any Court which may have to exercise jurisdiction in the matter from inquiring into and taking notice of the truth of the facts. All the acts done must be referred to the actual contract, which is the measure and test of their legal and equitable character and consequences. If, therefore, in such a case a conveyance were refused, and an action of ejectment brought by the vendor or his heir against the purchaser, nothing could be done towards ascertaining and adjusting the equitable rights and liabilities of the parties, without taking the contract into account. The matter has advanced beyond the stage of contract; and the equities which arise out of the stage which it has reached, cannot be administered unless the contract is regarded. The

(1) 8 App. Cas. 467, 475, 478, 479.

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choice is between undoing what has been done (which is not always possible, or, if possible, just) and completing what has been left undone. The line may not always be capable of being so clearly drawn as in the case which I have supposed; but it is not arbitrary or unreasonable to hold that when the statute says that no action is to be brought to charge any person upon a contract concerning land, it has in view the simple case in which he is charged upon the contract only, and not that in which there are equities resulting from res gestae subsequent to and arising out of the contract. So long as the connection of those res gestae with the alleged contract does not depend upon mere parol testimony, but is reasonably to be inferred from the res gestae themselves, justice seems to require some such limitation of the scope of the statute, which might otherwise interpose an obstacle even to the rectification of material errors, however clearly proved, in an executed conveyance, founded upon an unsigned agreement."

Here it is to be observed that Lord Selborne treats the doctrine as being founded upon an equity in the person seeking to enforce the contract, arising from acts done in execution of the contract, resulting in that change in his position. This is stating the doctrine substantially in the same way as it had been stated by Lord Cranworth, with, however, the material qualification contained in the last sentence. Lord Selborne proceeds to deal further with this qualification. He says: "The doctrine, however, so established has been confined by judges of the greatest authority within limits intended to prevent a recurrence of the mischief which the statute was passed to suppress. The present case, resting entirely upon the parol evidence of one of the parties to the transaction, after the death of the other, forcibly illustrates the wisdom of the rule, which requires some evidentia rei to connect the alleged part performance with the alleged agreement. There is not otherwise enough in the situation in which the parties are found to raise questions which may not be solved without recourse to equity. It is not enough that an act done should be a condition of, or good consideration

for, a contract, unless it is, as between the parties, such a part execution as to change their relative positions as to the subject matter of the contract. Lord Hardwicke in *Gunter* v. *Halsey* (1) said: 'As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement' ('the terms of which,' he added, 'must be certainly proved'). He thought it indeed consistent with that rule to treat the payment of purchase money, in whole or in part, as a sufficient part performance." Then after stating that on that point later authorities had overruled Lord Hardwicke's opinion, and that it was now settled that part payment of the purchase money was not enough, he added this: "All the authorities shew that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged. . . . . 'The acknowledged possession' (said Sir T. Plumer in *Morphett* v. *Jones* (2)), 'of a stranger in the land of another is not explicable, except on the supposition of an agreement, and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an enquiry into the terms, the Court regarding what has been done as a consequence of contract or tenure.' 'It is in general,' said Sir James Wigram (*Dale* v. *Hamilton* (3)), 'of the essence of such an act that the Court shall, by reason of the act itself, without knowing whether there was an agreement or not, find the parties unequivocally in a position different from that which, according to their legal rights, they would be in if there were no contract. . . . . But an act which though in truth done in pursuance of a contract, admits of explanation without supposing a contract, is not in general admitted to constitute an act of part performance taking the case out of the Statute of Frauds; as for example, the payment of a sum of money alleged to be purchase money.'"

In accordance with this decision of the House of Lords in *Maddison* v. *Alderson* (4) the law is thus stated in Fry on

(1) (1739) Amb. 586.
(2) (1818) 1 Swans. 172,181.
(3) (1846) 5 Hare, 369, 381.
(4) 8 App. Cas. 467.

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Specific Performance, 6th ed., p. 276: "In order thus to withdraw a contract from the operation of the statute, several circumstances must concur: 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2ndly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; 3rdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4thly, there must be proper parol evidence of the contract which is let in by the acts of part performance."

The third and fourth of these conditions exist in the present case. The question that I have to determine is whether the first and second also exist.

Now the mere fact that the plaintiff converted part of her premises into the flat and expended money thereon is not *only* referable to a contract such as that alleged. It is equally referable to her ownership of the premises. Nor would this improvement by the plaintiff of her own property be such an act as to render it a fraud in the defendant to take advantage of the contract not being in writing. It is, however, to be observed that in the present case the plaintiff in altering her premises and expending money in the alterations was doing so in accordance with requests and suggestions made to her or her employees from time to time by the defendant. It appears to me that this fact necessarily suggests the existence of some such contract as alleged. I think that any one on the spot who saw what was being done and the way in which it was being done would inevitably have come to the conclusion that the defendant must have a contract giving her some interest in the property. The act of the plaintiff in submitting, so far as she did submit, to the more or less constant interference of the defendant and in adopting, as from time to time she did adopt, the suggestions made by the defendant and in acceding, as she did accede, to the requests made by the defendant as to the method in which the flat should be constructed, are in my opinion referable only to a contract such as that alleged. This conclusion appears to me to be in

accordance with the decision of Kekewich J. in *Dickinson* v. *Barrow* (1), a case that in many respects bears a striking similarity to the present one. In his judgment, as reported, the learned judge seemed to be regarding the acts of the defendant as being unequivocal acts referable to an agreement, but I do not doubt that the learned judge must have arrived at the conclusion that the acts of the plaintiffs, when construed in the light of the defendant's acts, were sufficient acts of part performance on their part to raise the equity in their favour that had to be found before the plaintiffs could succeed in the action. I think that the effect of his decision is correctly stated in the headnote, where it says that it was held that the acts done by the plaintiffs at the request of the defendant were acts of part performance taking the case out of the Statute of Frauds.

It only remains to consider whether the acts of the plaintiff were such as to render it a fraud in the defendant to take advantage of the contract not being in writing. As to this I can feel no doubt. I am satisfied that had the plaintiff laid out the flat in the manner that she herself wished, it would, when constructed, have differed materially from what it is at present. As a result of acceding to the requests and suggestions of the defendant she is now possessed of a flat which is not likely to commend itself to tenants. It would cost her a sum of about 177*l.* to alter the flat to a condition in which it would be possible for her to let it to other persons. She has therefore, in carrying out her part of the contract, materially changed her position for the worse.

In these circumstances the plaintiff is in my opinion entitled to the decree for specific performance for which she asks, including an order on the defendant to repay to the plaintiff the cost of making the two partitions in the south rooms. The defendant must pay the costs of the action.

There is a counterclaim by the defendant, by which in the event of it being held that the defendant is bound by the agreement alleged in the statement of claim she seeks to recover the sum of 10*l.* 7*s.* by way of damages for the plaintiff's

(1) [1904] 2 Ch. 339.

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failure to convert the flat by August 6 or 23. Inasmuch, however, as the delay in completion was entirely due to the acts and omissions of the defendant, she is not entitled to any such relief, and the counterclaim must be dismissed with the usual consequences.

Solicitors for the plaintiff: *W. J. Lake & Son.*
Solicitors for the defendant: *Parfitt, Cresswell & Williams.*

J. L. D.

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WILDERMAN *v.* F. W. BERK AND COMPANY, LIMITED.

[1923. W. 3256.]

Patent—Infringement—Importation of Goods made with Apparatus including patented Invention—Patentee residing in Germany—Interest of hostile Person in British Patent—Vesting in Custodian—Divesting Order—Intermediate Infringement—Right to sue—Innocent Infringement—Injunction—Damages—Patents and Designs Act, 1907 (7 *Edw.* 7, *c.* 29), *s.* 33—*Trading with the Enemy Amendment Act*, 1916 (5 & 6 *Geo.* 5, *c.* 105), *s.* 4.

The question whether the importation of an article made with an apparatus of which a patented invention forms part is an infringement of the patent must be determined by reference to the nature of the invention and the extent to which its employment played a part in the production of the imported article.

The plaintiff was the patentee in this country of what, on the face of the specification, appeared to be a small mechanical detail in electrolytic cells. The patent for the cells themselves had expired, and the process was well known by which the cells were used in an apparatus to manufacture caustic potash. The defendants imported caustic potash manufactured by a German company with an apparatus in which the cells used embodied the patented invention. No evidence was put in by the plaintiff as to the nature or effect of the invention, or to show that the use of it was necessary to render the working of the process practicable or profitable:—

Held, that the importation of the caustic potash was not an infringement of the plaintiff's patent.

A patentee whose interest in a British patent has, owing to his residence in Germany, become vested in the Custodian under the General Vesting Order of October 30, 1918, cannot, after the interest in the patent has become revested in him by virtue of the Divesting Order dated July 24,

1920, sue in respect of an infringement of the patent committed between the dates of the Vesting and Divesting Orders.

When a patent has been infringed by a person acting in good faith and without having any reasonable ground for suspecting the existence of the patent, or any information that of itself offered him the means of making himself aware of the existence of the patent, he is entitled to the protection afforded by s. 33 of the Patents and Designs Act, 1907, in respect of any claim for damages for infringement.

WITNESS ACTION.

The plaintiff was the registered legal owner of Letters Patent No. 26568 of 1910 granted to him in respect of an invention entitled "Improvements in Electrolytic Cells for the Electrolysis of Alkaline Salts." The complete specification stated that in Letters Patent No. 9803 of 1902 an electrolytic cell with stagnant or stationary mercury cathode had been described, in which the mercury is contained in superimposed troughs; and that within the troughs carbons floated on the caustic side; and after explaining, in effect, that experience had shown that in working the process for which the troughs were employed, there was a difficulty in keeping the carbons in contact with the surface of the mercury, the specification expounded two methods for overcoming the difficulty, one of which was expressed as follows: "The troughs *c* themselves are provided at suitable intervals with small noses *d*, as shown in Figure 1 on the right side, so as to keep the little carbons *e* in their positions."

The plaintiff alleged that the defendants had infringed the said letters patent by importing into Great Britain in November and December, 1919, caustic potash purchased from the Deutsche Wilderman Werke, a German company engaged in the manufacture of caustic potash by the use of apparatus constructed and working as claimed in the specification. And the plaintiff claimed an injunction to restrain the defendants their servants and agents from in any way infringing the plaintiff's patent and damages in respect of the infringements committed.

The circumstances in which the importation by the defendants of about sixty tons of potash manufactured by the company took place in November and December, 1919,

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are as follows: In 1919 caustic potash could not be imported into this country without a licence from the Government. The British Government arranged with the Deutsche Wilderman Werke (hereinafter referred to as "the German company") for an option to take from them on certain terms a specified amount of caustic potash per month, and the amount available under the option was allocated by the British Government between British traders desirous of importing caustic potash with a licence to import upon terms which strictly limited the manner in which the licensees might deal with the product and imposed upon them the obligation of paying to the German company the price. The defendants had allocated to them and were licensed to import the sixty tons of caustic potash under this option.

The defendants, by their defence, set up four different defences. They said, first, that the importation complained of was not an infringement of the plaintiff's patent; secondly, that the plaintiff was at all material times residing and carrying on business in Germany and therefore that the action was not maintainable by reason of art. 309 of the Treaty of Peace with Germany and the Treaty of Peace Order or under the common law; thirdly, that at the date of the alleged infringement the plaintiffs' letters patent were vested in the Custodian for England and Wales, by reason of the "General Vesting Order" made by the Board of Trade on October 30, 1918, under the Trading with the Enemy Amendment Act, 1914; and, fourthly, that the defendants were not at the date of the alleged infringement aware, nor had they reasonable means of making themselves aware, of the plaintiff's patent and had acted innocently and never threatened or intended to infringe, so that no injunction should be granted against them, and that no damages could be recovered against them by virtue of s. 33 of the Patents and Designs Act, 1907.

The validity of the plaintiff's patent was not denied. Evidence was given on behalf of the plaintiff by Mr. William A. Caldwell, who said that in May, 1919, he was appointed to the Economic Section of the British Military Governor's staff at Cologne (chemical section), and had the special duty of

granting licences for the import and export of chemicals into and from the part of Germany in the occupation of the British Army, and that in November and December, 1919, he was appointed the representative of a firm whose function it was to report to the British Government on the quality of the products supplied by the German company under the option. In this latter capacity he became aware that part of the German company's products went to the defendants. He also visited the German company's works, which were in the occupied area, and made himself familiar with the apparatus used in the works, and he saw that the troughs used for the production of all caustic potash had projections or noses on them.

He also stated that he met the plaintiff in Germany in or about October, 1919, and that at the end of that month he obtained for him a permit to leave the occupied area.

The plaintiff did not go into the witness box.

On the question whether the plaintiff was at all material times voluntarily resident in or carrying on business in Germany, the defendants relied on the above evidence of Mr. Caldwell that the plaintiff was there in October, 1919, and as regards a period before this on the following documentary evidence.

By the statutes of the German company, it appeared that the plaintiff was one of the parties who on November 7, 1912, established the German company as a company with limited liability; and that the German company was based upon articles of association which contained provisions: (art. 4), that the plaintiff should have 1,000,000 marks of the original capital of the German company amounting to 3,000,000 marks and should leave on loan with the German company a further sum of 2,000,000 marks, all which total sum of 3,000,000 marks was owing to him under a preliminary agreement dated August 15, 1912, as amended by an agreement dated October 29, 1912, in consideration of his bringing into the German company certain German patents, including the German patent of the invention in question; (art. 11), that the plaintiff should be entitled, so long as he held at least

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10 per cent. of the German company's capital, to nominate two members of the committee of inspection, a body which by art. 12 was to exercise control over the directors of the German company.

It also appeared that at the first general meeting the plaintiff appointed himself and another person to be members of the committee of inspection, and it was admitted that he retained his position until he entered into an agreement dated March 5, 1918. By this agreement the plaintiff agreed to transfer his shares in the German company and all his rights thereunder and under the above-mentioned agreements in consideration of a sum of 1,054,000 marks, to be paid to him by the German company in instalments, and of the return to him of certain letters patent for Norway, Sweden and Switzerland. Under the agreement the German company retained the German patents, and the plaintiff agreed to supply to the German company free of expense any supplementary or additional patents in the sphere of potassium electrolysis. He also agreed to assist the German company in certain pending patent actions against a firm in Hamburg, abandoned all further claims against the German company, and resigned his office on it.

Two of the directors of the defendant company, Mr. P. F. Berk and Mr. A. D. Berk, gave evidence to the effect that they did not at the time of the purchase of caustic potash have any knowledge of the plaintiff's patent, although they knew there was an inventor of the name of Wilderman who had made inventions connected with the manufacture of caustic potash. They were not aware of his exact position in relation to the German company, and they assumed that any business with that company would be regular and proper.

Sir Arthur Colefax K.C. and *Courtney Terrell* for the plaintiff. There is evidence here that the defendants imported into this country in November and December, 1919, caustic potash bought from the German company, and that this caustic potash was made with apparatus that embodied the patentee's invention. The infringement of the plaintiff's

patent is therefore established, and it is for the defendants to establish any of the defences they seek to set up. The plaintiff is a Rumanian subject, and there is nothing to prove that he remained in Germany after he severed his connection with the German company in March, 1918.

Sir Duncan Kerly K.C. and *J. Ewart Walker* for the defendants. There is no evidence of infringement. While it is true that the importation into this country of goods made by a patented process is an infringement of the English patent for the process, that is not so where the English patent is for a part of an apparatus and not a process. The process of producing caustic potash by electrolysis is general knowledge, and the plaintiff's patent of 1902 for the electrolytic cell employed has expired. The whole invention of which an infringement is alleged is a small improvement of the electrolytic cell—namely, noses to keep the carbon rods in position.

It would be an extraordinary result if the importation of a product in the manufacture of which apparatus was used of which a small detail was patented in this country, amounted to an infringement of the patent. Is it to be said that when in making a box a patented hammer is employed for driving in the nails, the importation of the box would be a breach of the patent? The difficulty is to fix the point at which the importation of an article becomes a breach of the patentee's right of property in his invention. It is suggested that in order that the importation of a manufactured article should be an infringement the invention must functionally affect the article produced. In *Elmslie* v. *Boursier* (1) it is decided that "the importation and sale in England of articles manufactured abroad according to the specification of an English patent is an infringement," but that was a case of a process invention. So also was *Von Heyden* v. *Neustadt* (2) and *Saccharin Corporation* v. *Anglo-Continental Chemical Works.* (3) The only case where the sale of goods made with a patented machine seems to have been regarded as an infringement is *Townsend* v.

(1) (1869) L. R. 9 Eq. 217. (2) (1880) 14 Ch. D. 230.
(3) (1900) 17 R. P. C. 307.

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Howarth. (1) There, however, the actual patent Jessel M.R. was dealing with seems to have been for a process, but he said in his judgment: "What is every person prohibited from doing? He is prohibited from making, using or vending the prohibited articles, and that, of course, includes in the case of machinery, the product, if I may say so, of the machinery which is the subject of the patent." This is only dictum, and it is suggested that some such limitation must be put upon it, as was stated above.

Even, however, if there was an infringement, s. 33 of the Patents and Designs Act, 1907, affords a complete answer to the action. This was an isolated transaction in 1919, which has never been repeated or threatened to be repeated; there is no ground therefore for granting an injunction, and the only possible remedy would be damages. It is a complete answer to the claim for damages that the defendants were innocent infringers. They were not in 1919 aware of the plaintiff's patent, and had no reasonable means of making themselves aware of it: compare *Byrne* v. *Statist Co.* (2), a case under s. 8 of the Copyright Act, 1911.

[TOMLIN J. The words of that section were different.]

The fact that all British patents are filed at the Patent Office does not mean that there is in every case "a reasonable means" within s. 33 of making oneself aware of any particular patent. So to hold would be to render the section nugatory. There must be something to put the dealer in an article on his inquiry, and here there was nothing. The proviso to the section shows that the appearance on the article of the word "patented" is not enough to put an innocent infringer on his inquiry.

Again the plaintiff cannot maintain these proceedings, because he was residing or carrying on business in Germany on June 28, 1919, when the Treaty of Versailles was signed, and is therefore debarred from suing by art. 309. The acts complained of were done before the Treaty was ratified and came into force. Further, the plaintiff is debarred from suing at

(1) (1875) 12 Ch. D. 831*n*. (2) [1914] 1 K. B. 622.

common law: *Porter* v. *Freudenberg* (1); *Scotland* v. *South African Territories*. (2)

[TOMLIN J. Is not the question one of procedure only? A person cannot appear in the King's Courts to sue so long as he is an alien enemy, but when he ceases to be an alien enemy, his right to sue revives.]

It is suggested that the second of the cases cited shows that the disqualification goes further than that.

Again, the patent at the time the cause of action arose was not vested in the plaintiff but in the Custodian under the General Vesting Order of October 30, 1918. The patent was reassigned by an Order dated July 24, 1920, but this could not vest in the original patentee the right to sue for a tort committed in the interval. The General Vesting Order was made under s. 4 of the Trading with the Enemy Amendment Act, 1916, and it covered the plaintiff, as he was an "enemy," though not an "enemy subject" within the meaning of that Act: see s. 15. It is true that the plaintiff had ceased to carry on business in Germany in March, 1918, but he continued to reside there and must be presumed to have been voluntarily residing there. He had certainly been voluntarily resident down to the date of the agreement of March 5, 1918.

Sir Arthur Colefax K.C. in reply. The importation of caustic potash made with apparatus embodying the plaintiff's invention is an infringement of his English patent for that invention. There is nothing to show that this invention is of a mere "detail improvement" or that the caustic potash could be commercially produced without the use of the invention. There is on this part of the law no distinction between a patented process and a patented machine. The sale of an article made by a patented machine is an infringement of the patent. There is no right to deprive the patentee of any of his monopoly rights. The profit of a patented machine may be obtained by using it to produce some product as well as by selling the machine itself: *Wright* v. *Hitchcock*. (3)

(1) [1915] 1 K. B. 857. (2) (1917) 33 Times L. R. 255.
(3) (1870) L. R. 5 Ex. 37.

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The test in every case is whether the patentee is deprived of profit by the sale of produce made with the patented apparatus, and it does not turn on whether the patent is for a process or a machine.

[TOMLIN J. I can understand that when a machine is used for producing something sui generis which can be produced in no other way, the producer may have infringed the patent for the machine.]

Everything the manufacture of which is assisted to any extent by a patented machine is an infringement of the patent: *Wright* v. *Hitchcock* (1); *Elmslie* v. *Boursier* (2); *Von Heyden* v. *Neustadt* (3); *Saccharin Corporation* v. *Anglo-Continental Chemical Works.* (4)

As regards the defence under s. 33 of the Patents and Designs Act, 1907, it is impossible for the defendants to say they had no reasonable means of making themselves aware of the existence of the patent. They knew Wilderman was a patentee of inventions relating to the manufacture of caustic potash, and that the Deutsche Wilderman Werke was manufacturing caustic potash. They need only have searched against the name Wilderman at the patent office to obtain knowledge of the patent.

[TOMLIN J. May not the section mean that the infringer must have had to his hand the reasonable means of making himself aware of the existence of the patent ?]

No, the means need only be available. This is a section for the relief of infringers, and must be construed strictly. Further the plaintiff is here entitled to an injunction.

Again, art. 309 of the Treaty of Peace with Germany only came into force on January 10, 1920, when the Treaty was ratified, and this article was made part of the municipal law by the Treaty of Peace Order, 1919. On the evidence the plaintiff was not residing or carrying on business in Germany on January 10, 1920. Mr. Caldwell said the plaintiff left Germany in October, 1919.

[TOMLIN J. He could only speak to the plaintiff's leaving

(1) L. R. 5 Ex. 37.
(2) L. R. 9 Eq. 217.
(3) 14 Ch. D. 230.
(4) 17 R. P. C. 307.

the occupied territory, and the plaintiff failed to go into the box and say when he left Germany.]

There is no evidence that he was resident in Germany after the end of October, 1919, and still less that he was voluntarily resident there, and the onus was upon the defendants to prove this.

Lastly, the Vesting Order of October 30, 1918, vested all pending rights of action, and the divesting order is equally wide in its terms and vests in the patentee any right of action which had accrued up to then: see the definition in the divesting order of "vested patents."

Cur. adv. vult.

Oct. 30. TOMLIN J. delivered the following written judgment: This is an action for relief in respect of the alleged infringement of Letters Patent No. 26568 of 1910 granted to the plaintiff in respect of an invention entitled "Improvements in Electrolytic cells for the Electrolysis of Alkaline Salts." [His Lordship then stated the nature of the invention substantially as set out above and continued:] The validity of the patent in suit is not attacked. The patent of 1902 has not been put in evidence. No evidence has been adduced to explain the nature or utility of the invention, the subject of it. So far as indications appear in the patent in suit of the nature of the invention covered by the 1902 patent, such invention seems to have been one for an apparatus to be employed in a well-known process rather than for a process itself. The date of the 1902 patent suggests that it expired not later than the year 1916, and no evidence to the contrary has been adduced.

The plaintiff's case is that in November or December of 1919 the defendants imported into this country caustic potash, which had been manufactured by a German company called the Deutsche Wilderman Werke in an apparatus in which the troughs had projections or noses for keeping the carbons in position, and therefore that the importation into this country of anything made in the apparatus was an infringement of the patent. [His Lordship then stated the defendants'

TOMLIN J. four defences and the circumstances in which the caustic potash was imported by the defendants.]

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The only evidence directed to the matter of infringement adduced by the plaintiff was that of Mr. William Alfred Caldwell, an analytical chemist. In May, 1919, Mr. Caldwell was appointed to the Economic section of the British Military Governor's staff at Cologne. His duty was the issue of licences for the import into and the export from the occupied area of chemicals, and the inspection of chemicals exported and imported under licences. In November or December he was also appointed the representative of a firm whose function it was to report to the British Government on the quality of the products supplied by the German company under the option to the British Government. In this latter capacity he became aware that part of the German company's products went to the defendants, he made himself familiar with the apparatus used in the works, and he saw that the troughs used for the production of all caustic potash had projections or noses on them. It is, I think, not disputed that the German company in fact owned the German patent corresponding with the patent in suit. When Mr. Caldwell was at the German company's works he knew nothing about and had never seen the specification of either the English or German patents, and he does not appear to have been specially familiar, or previously to have come in contact, with any of the several processes which can be employed in the production of caustic potash. I am, however, satisfied that what he did see were troughs constructed with projections or noses similar in kind to those indicated in the specification.

It does not, however, in my opinion, necessarily follow that the importation of caustic potash made in those troughs was an infringement of the patent in suit. I have had no evidence of any kind directed to the nature or effect of the invention. I am not informed by evidence how far, if at all, the invention is effectual in practice, or what is its precise function in the process of electrolysis of alkaline salts, that is, whether it relates to a mere mechanical detail of the apparatus employed or whether it is something the use of which is necessary to

render the working of the process practicable or profitable. On the face of the specification the invention has the appearance of being one relating to a small mechanical detail in an apparatus, the patent for which expired in 1916, and the use of which was in connection with a well-known process.

It is urged on the plaintiff's behalf that once I am satisfied that there has been used in connection with the manufacture of an imported article in however an unimportant or trifling respect some apparatus or material in respect of which there is a subsisting patent, the importation of the article manufactured is necessarily an infringement. I do not think that the cases to which I have been referred compel me to accept so wide a proposition, and I do not accept it. I cannot think, for example, that the employment of a patented cutting blow-pipe or a patented hammer in the manufacture of some part of a locomotive would necessarily render the importation of the locomotive an infringement.

In my judgment each case must be determined on its own merits by reference to the nature of the invention, and the extent to which its employment played a part in the production of the article, the importation of which is complained of. In the absence of any evidence of this character in the present case, and in the face of the language of the specification itself, I do not think the plaintiff has proved, and I am not prepared to hold that the device, the subject matter of the invention, was of such a character, or was so used, in relation to the manufacture of the caustic potash in question as to render the importation of such potash an infringement of the patent.

I think, therefore, that the plaintiff fails in limine. It is, however, right that I should deal also with the other defences.

As to the plaintiff's right to sue, I will refer first to the relevant instruments and Act. Art. 309 of the Treaty, being one of the articles scheduled to the Treaty of Peace Order, is as follows: "No action shall be brought and no claim made by persons residing or carrying on business within the territories of Germany on the one part and of the Allied or Associated Powers on the other, or persons who are nationals of such Powers respectively, or by any one deriving title during the

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war from such persons, by reason of any action which has taken place within the territory of the other party between the date of the declaration of war and that of the coming into force of the present Treaty, which might constitute an infringement of the rights of industrial property or rights of literary and artistic property, either existing at any time during the war or revived under the provisions of articles 307 and 308." The Trading with the Enemy Amendment Act, 1916, provides by s. 4, sub-s. 1 : " The Board of Trade, in any case where it appears to them to be expedient to do so, may by order vest in the custodian under the Trading with the Enemy Amendment Act, 1914, any property, real or personal (including any rights whether legal or equitable, in or arising out of property, real or personal), belonging to or held or managed for or on behalf of an enemy or enemy subject, or the right to transfer that property, and may by any such order, or any subsequent order, confer on the custodian such powers of selling, managing and otherwise dealing with the property as to the Board may seem proper." And then sub-s. 5 of the same section provides that " All property vested in the custodian under this section, and the proceeds of the sale of, or money arising from, any such property shall be dealt with by him in like manner as money paid to and property vested in him under the Trading with the Enemy Amendment Act, 1914, and section five of that Act as amended by this Act shall apply accordingly." Sect. 15 contains a definition of " enemy subject " as " a subject of a State for the time being at war with His Majesty."

On October 30, 1918, a General Vesting Order was made under that Act, and by that General Vesting Order the expression " hostile person " is defined in the preamble as meaning and including " (*a*) a person, firm, body or company being an enemy or enemy subject within the meaning of the Trading with the Enemy Amendment Acts, 1916 and 1918." The operative part of the Order provides that the Board of Trade in exercise of the powers of the Acts do hereby order that " (1.) all and every the interest, share and right of every hostile person in, of or to any British patent, including all

rights of action, which since the 4th day of August, 1914, have or would but for the present war have accrued to any hostile person in respect or by reason of any British patent" and "(2.) the benefit of every application which had been made by or on behalf or for the benefit of any hostile person for any British patent do except in so far as the same shall already have been vested by any order made under the Trading with the Enemy Amendment Acts or any of them vest in the public trustee .... the custodian for England and Wales under the Trading with the Enemy Amendment Act, 1914," and by a Divesting Order which was dated July 24, 1920, after reciting the Order of October 30, and reciting that "the expression 'vested patent' as hereinafter used means such interest, share, rights or title in, of or to a British patent as may by reason or on account of the late war between the United Kingdom and Germany have been so vested"—that means vested by virtue of the General Vesting Order—"in or granted to the custodian as aforesaid." Then s. 1, sub-s. 1, provides that "Subject to the provisions hereinafter contained the custodian shall forthwith divest himself of the vested patents and of the vested applications in favour as the case may be of the respective persons who were at the commencement of the late war between the United Kingdom and Germany or would but for such war and the relative Vesting Orders now be entitled thereto."

Now I find as a fact that the plaintiff was residing and carrying on business in Germany before and up to March, 1918, and thereafter continued to reside in Germany and was residing in Germany on October 30, 1918. There is no evidence to show that he has ever ceased to reside in Germany, though there is evidence that he went out of the area occupied by the British Army in October, 1919, under a permit. Whether he left temporarily or permanently or where he went does not appear. Mr. Caldwell said the plaintiff left Germany about October, 1919, but he was clearly only speaking of his departure from the British area. The witness knew nothing of the plaintiff's movements beyond the fact that he obtained the necessary permit to leave the area and apparently left it.

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If the plaintiff's residence in Germany was then terminated it rested on him to prove it.

There is no evidence that his residence in Germany was otherwise than voluntary, and in the absence of evidence to the contrary it must, I think, be assumed to be voluntary.

The above are, in my judgment, the fair and proper conclusions to be reached upon the documentary evidence put in by the defendants, and the evidence given by Mr. Caldwell, a witness for the plaintiff. No evidence tending to displace these conclusions was called on the plaintiff's behalf. The plaintiff, the most obvious witness to clear up any doubt in the matter, did not go into the box. It was stated by counsel that the plaintiff has been at all material times and is a Roumanian national, but no evidence was called on this point. For the purpose of this judgment, however, I am content to assume that this is the case.

Upon the basis of the conclusions which I have stated I hold that the plaintiff cannot, even if the alleged infringement was proved, maintain the present action. First, I think that at the date of the alleged infringement the patent was vested in the custodian, because at the date of the Vesting Order the plaintiff was a hostile person within the meaning of that phrase as defined in the Vesting Order. Further, I do not think that there is any language in the Divesting Order wide enough to transfer to the plaintiff a right of action accrued to the custodian after the Vesting Order, and while he was the owner of the patent. An assignment of the patent, statutory or otherwise, would not per se carry an accrued right of action for infringement, and the definition in the Divesting Order of a vested patent is not, in my opinion, such as to include a right of action accrued to the custodian after the Vesting Order. And secondly I think that the plaintiff's case falls within art. 309 of the Treaty. In my judgment, whatever be the true construction of the article, it covers the case where (as I hold here) (*a*) it is proved that the plaintiff did acquire the character of a resident in Germany during the war, and (*b*) it is not proved that that character was ever lost.

As to the final defence I will read first of all s. 33 of the Act.

"A patentee shall not be entitled to recover any damages in respect of any infringement of a patent granted after the commencement of this Act from any defendant who proves that at the date of the infringement he was not aware, nor had reasonable means of making himself aware, of the existence of the patent, and the marking of an article with the word 'patent,' 'patented,' or any word or words expressing or implying that a patent has been obtained for the article, stamped, engraved, impressed on, or otherwise applied to the article, shall not be deemed to constitute notice of the existence of the patent unless the word or words are accompanied by the year and number of the patent."

Now having seen two of the directors of the defendants in the box I am satisfied that the defendants acted in good faith, and were not aware of the existence of the patent, and had no reasonable ground for suspecting its existence, nor, in my opinion, did the actual information in their possession of itself offer them means of making themselves aware of the existence of the patent, and if this be so I think that upon the true construction of s. 33 of the Patents and Designs Act, 1907, they can claim the protection extended by that section, and that no damages in any case can be recovered from them. Further, apart from the alleged act of infringement, there is no evidence of any threat or intention on the part of the defendants to infringe. The importation itself was made in special circumstances from which I do not think a general intention to infringe can be inferred, and though the plaintiff was aware in 1920 of what the defendants had done, he did not begin his action until September 12, 1923, and he has alleged no subsequent fact directed to support an intention or threat to infringe. I do not think in the circumstances that if the importation complained of was an infringement, any injunction should be granted.

I think the action fails and must be dismissed with costs.

Solicitors: *Dehn & Lauderdale; Keene, Marsland & Co.*

H. C. G.

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BRADFORD *v.* GAMMON.

[1923. B. 6215.]

Partnership—Agreement—Construction—Purchase of deceased Partner's Share—Indemnity against Liabilities—Overdraft at Bank—Guarantee by each Partner—No Demand for Payment—Quia timet Action.

Under a written instrument of partnership entered into in February 1920, between five co-partners for the development and ultimate resale of a freehold estate which they had purchased it was provided that, upon the death of any of the partners before the estate had been completely sold, the share or interest of the one so dying should be purchased by the others in equal shares at a price to be fixed by arbitration in case of difference, and the legal personal representatives of the deceased partner were to be "indemnified" by the surviving partners from all future claims, liabilities, and demands, in respect of the said estate. One of the partners died on October 4, 1921, and the greater part of the freehold estate was still unsold. At the date of the partner's death the partnership account at a bank was largely overdrawn. The overdraft was secured by the guarantee of each partner. The exact amount of the overdraft was subsequently ascertained by the bank to be 17,126*l.* 16*s.* 2*d.*, and the manager informed the executor of the deceased partner of this, and of the liability of the partnership syndicate and the testator's estate, but no demand for payment was ever made.

In an action by the plaintiff as legal personal representative of the deceased partner against his four co-partners as defendants claiming specific performance of the partnership agreement and requiring a proper discharge and release from all the liabilities of the partnership, particularly in respect of the overdraft at the bank:—

Held, that the ordinary covenant contained in the agreement to indemnify the estate of a deceased partner did not entitle the plaintiff to insist upon the immediate payment of debts for which no demand had been made. The obligation to make good the indemnity by payment and the right to enforce the covenant arose when the demand for payment was made and not before.

Ascherson v. *Tredegar Dry Dock and Wharf Co.* [1909] 2 Ch. 401 distinguished.

Held, therefore, that the plaintiff was not entitled to what would be in substance an order on the defendants to repay all that was owing to the bank, and the action failed.

ACTION (without witnesses).

The plaintiff, Henry George Bradford, was the executor under the will of Robert Jude Bradford, who died on October 4, 1921, and he sued as the testator's legal personal representative. By an agreement in writing, dated February 19, 1920, made

between the defendant, Alfred James Gammon, of the first part, and the defendants, W. Mewburn, W. G. Mewburn, R. J. Bradford and Ernest R. Taylor, of the other four parts respectively, after reciting that the parties thereto had agreed to purchase in equal shares as specified in the schedule thereunder, a freehold estate known as "Dangstein," near Rogate, in the county of Sussex, with a view of reselling the same at a profit, and that A. J. Gammon had contracted to purchase the said estate for 28,250*l.* at the request of and as trustee for all the parties thereto, and that they had mutually agreed to enter into the agreement thereinafter contained, it was thereby agreed by cl. 9 that upon the death of any of the parties thereto before the said estate should have been completely sold, the share and interest of the one so dying should be purchased by the others of the parties in equal shares, and the price of the share of the one so dying should, in case of dispute, be referred to arbitration in the usual way under the Arbitration Act, 1889, and the price paid to the executors or administrators of the parties so dying, and on payment of such price his executors or administrators should sign or execute such receipts and assurances as should be reasonably required, "and shall be indemnified by the others of the said parties from all future claims, liabilities, and demands hereunder in respect of the said estate and premises." By the schedule to the agreement the one-fifth share of each of the five partners was set out as 500*l.* The agreement also contained an arbitration clause, which provided that any dispute or difference which might arise between the parties as to the construction of the agreement and their respective interests therein should be referred to arbitration under the Arbitration Act, 1889. The purchase of "Dangstein" was completed and the greater part of the estate still remained unsold. For the purposes of the partnership constituted by this agreement an account was opened at the Godalming branch of Lloyds Bank, Ld., and in consideration of this an undertaking was signed by all five partners, agreeing to be jointly and severally liable for any overdraft. At the date of the death of R. J. Bradford this account was very largely

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overdrawn. As a security for this overdraft the bank held the title deeds of the freehold estate belonging to the syndicate. On December 20, 1922, the bank manager informed the plaintiff by letter that the syndicate, of which the late Mr. R. D. Bradford was a member, was still indebted to the extent of about 20,000*l.*, and that therefore his estate was still liable. Subsequently on October 12, 1923, the manager wrote saying that the amount then due, for which the executor of Mr. R. J. Bradford had not been released, was 17,126*l.* 16*s.* 2*d.*, plus interest from June 30, 1923. By his statement of claim the plaintiff contended that by cl. 9 of the syndicate agreement he was entitled to require the defendants (*a*) to purchase the testator's share and interest under the agreement, and (*b*) to indemnify the plaintiff and the estate of the testator against all the liabilities of the partnership, and (*c*) to procure for the plaintiff and the testator's estate a proper discharge and release from all such liabilities, and particularly from the liability to Lloyds Bank in respect of the overdraft. The plaintiffs claimed a declaration on each of these three claims, satisfaction of the overdraft with interest from June 30, 1923, and (2.) specific performance of cl. 9 of the agreement. Alternatively, to have the affairs of the partnership wound up and the assets divided according to the rights and interests of the parties therein. The defendants, by their defence, while not denying their liability to purchase the testator's share in the estate, and also to indemnify his estate against all claims and liabilities under the agreement in respect of the estate which were future at the date of the testator's death, did not admit that on the true construction of the agreement the plaintiff was entitled to the relief claimed under (*c*) and submitted that the real dispute between the parties was the basis on which the testator's share should be valued.

Vaisey for the plaintiff. The case comes within *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1), which is indistinguishable from it. Under cl. 9 of the agreement the plaintiff is entitled to be indemnified against the "future" liabilities of the

(1) [1909] 2 Ch. 401.

partnership, which must mean all liabilities thereafter incurred. The overdraft was secured by the guarantee to Lloyds Bank, signed by each of the five partners. As between vendor and purchaser of an incumbered estate there is a rule of law that the vendor is to be indemnified against any incumbrance, and such a covenant will be implied if necessary: *Bridgman* v. *Daw*. (1) The meaning of "indemnity" must be an effectual indemnity. The plaintiff is in the position of a surety for the principal debtors and is entitled to be relieved from his liability by the payment of the debt by the defendants. The form of covenant for indemnity is given in Dart's Vendors and Purchasers, 7th ed., pp. 579, 580, and in Davidson's Precedents, 4th ed., vol. ii., p. 453, in a sale of an equity of redemption, where there is a covenant to pay the mortgage debt and indemnify the vendor.

[EVE J. referred to *Mills* v. *United Counties Bank*. (2)]

If the plaintiff were to pay off the overdraft at the bank there would be no answer to an action by him against the defendants to compel them to pay their share, and why should he be driven to take two proceedings where one is sufficient? This is in a sense a quia timet action, but the testator's estate cannot be distributed by the plaintiff while this cloud of liability is hanging over it.

[He also referred to *Morrison* v. *Barking Chemicals Co*. (3) and *In re Mitchell*. (4)]

G. D. Johnston for the defendants. Clause 9 of the agreement of partnership provides a complete code for the purchase of a deceased partner's share. No implied covenant is necessary, and the terms of the clause exclude anything else. It is also not a question of the purchase of an equity of redemption, nor is the plaintiff a surety. The first two claims (*a*) and (*b*) are not disputed. As to claim (*c*), the contract here is for an indemnity, not for a release. It is only if and when the plaintiff is called upon to pay that the question of indemnity arises. A release is quite a different thing. The case of *Mills* v. *United Counties Bank* (2) is in my favour

(1) (1892) 40 W. R. 253.
(2) [1912] 1 Ch. 231.
(3) [1919] 2 Ch. 325.
(4) [1913] 1 Ch. 201, 206.

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and excludes any implication of covenant. In *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) there was what the judge held to have amounted to a demand for payment. In the present case the bank were careful not to make any demand for payment and obviously were not pressing the plaintiff. On the question of hardship upon the executor in not being able to distribute the estate, it is his testator who entered into the bargain which binds his estate. In *Morrison* v. *Barking Chemicals Co.* (2) Sargant J. said there was no existing liability on the plaintiff there to pay the 5000*l.*; it was to be set up at a future date. That is similar to the position here. The last case bearing upon this subject is *In re Ledgard.* (3)

Vaisey in reply.

EVE J. The plaintiff as legal personal representative of the late Mr. Bradford, who died in October, 1921, claims, as against the defendants, who were testator's co-partners at the date of his death, certain declarations, his right to which is not disputed, and in addition an order on the defendants to procure the release of the plaintiff and his testator's estate from the liabilities of the partnership subsisting at the testator's death. The partnership was constituted by a written instrument dated February 19, 1920, and the joint adventure into which these five gentlemen entered was the purchase in equal shares and the development and ultimate resale of a landed estate. Clause 9 of the partnership deed provided that upon the death of any of the partners before the estate should have been completely sold and realized, the share or interest of the one so dying should be purchased by the others in equal shares, and thereafter the legal personal representatives of the deceased partner were to have no voice in the realization or management of the estate. The price to be paid by the continuing partners was, in case of difference, to be determined by arbitration, and on payment of the price the legal personal representatives of the deceased partner were to sign and execute such receipts and assurances

(1) [1909] 2 Ch. 401. (2) [1919] 2 Ch. 325.
(3) [1922] W. N. 105.

as should be reasonably required, and were to be indemnified by the surviving partners from all future claims, liabilities, and demands in respect of the said estate and premises. The continuing partners are willing to enter into a covenant to pay the partnership debts and to indemnify the plaintiff and the testator's estate against the debts and liabilities, and when they have done that they contend that they will have done all that can reasonably be required of them. The plaintiff on the other hand claims that he is entitled to the order I have already mentioned.

At the testator's death the partnership had an overdraft at the bank amounting to 17,000*l.* and upwards secured by deposit of the title deeds of the estate and guaranteed by each partner. On being notified of his death the bank closed the account with a debit of 17,126*l.* 16*s.* 2*d.* and gave notice to the plaintiff that this was the sum owing, but made no demand for payment. So far as appears on the evidence the other liabilities of the partnership were not of any substantial amount, but the liability to the bank necessarily ties up the administration of the testator's estate, the net amount of which does not largely exceed the claim of the bank. In these circumstances the plaintiff finds himself in a difficulty, and is naturally desirous of obtaining a release from the bank, and, if such release can only be obtained by payment of the whole amount, he claims that the defendants are bound to pay the whole amount, notwithstanding that the bank has made no demand for payment. The question between the parties does not arise in this case upon any implied obligation imposed upon the surviving partners as purchasers, but upon the construction of the clause I have read from the partnership articles. Does their covenant to indemnify involve this, that if the plaintiff as legal personal representative calls upon them so to do they are bound to discharge all the partnership debts subsisting at the date of the dissolution brought about by his testator's death, although no creditor is demanding immediate payment ?

No authority has been cited which goes to that length, and it is obvious that if such be the obligation upon continuing

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partners who enter into the ordinary covenant indemnifying an outgoing, or the estate of a deceased partner, it is one that might very seriously cripple, and indeed in many cases effectually suspend, the carrying on of the business. In this particular case the partnership indebtedness is substantially represented by the debt to one creditor, but that of course cannot affect the rights of the parties, and if the plaintiff is right he could obtain the same order he is now asking for if this 17,000*l.* represented the aggregate of partnership debts due to any number of creditors.

Mr. Vaisey on his behalf has mainly relied on the case of *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1), but in one important respect the position there differed essentially from what it is here. The plaintiff there was the executor of a surety and the defendant was the principal debtor. The creditors were bankers, and, as here, so soon as they learned of the death of the surety they closed the account, and later on informed the surety's executor of the amount owing and, as the learned judge found, made a demand upon him for payment. In these circumstances it was held that the surety's executor was entitled to an order upon the principal debtor to pay the debt. But here the creditors have made no demand for payment, and the position existing is that referred to by Sargant J. in the concluding paragraph of his judgment in *Morrison* v. *Barking Chemicals Co.* (2), where he says: "I have not to deal with the case, which was much debated before me, of what would happen if the bank took the initiative in closing the current account and then abstained from making a demand on the surety." He adds: "The case is not a probable one," but it happens to be this very case, and I have now to decide whether in the absence of any demand for payment by the creditor the circumstances are brought within the principle of the two cases I have referred to. I do not think they are. It may be of course that the plaintiff could pay off the bank and then sue the defendants, and by these means get rid of the liability; but that is a possibility which does not touch the

(1) [1909] 2 Ch. 401. (2) [1919] 2 Ch. 325, 332.

problem with which I have to deal in this action, which can be stated thus: Does the ordinary covenant to pay partnership debts and to indemnify the outgoing partner or the estate of the deceased partner against debts and liabilities entitle the retiring partner or the legal personal representative of the deceased partner to insist upon the immediate payment of debts for which no demand for payment has been made? I do not think it does. So long as the covenantee is kept indemnified he cannot in my opinion insist upon the covenantor discharging debts for which no demand has been made; the obligation to make good the indemnity by payment and the right to enforce the covenant arises when the demand is made and not before. I think the plaintiff's claim fails, and I must dismiss the action with costs.

Solicitors: *Speechly, Mumford & Craig, for Lamport, Bassitt & Hiscock, Southampton; Hurford & Taylor.*

G. M.

DEWHURST *v.* SALFORD GUARDIANS.

[1923. D. 2257.]

Statute—Contracting Out—No express Prohibition—Limited Class of Community—Poor Law Officers and Servants—Compulsory Pensions Scheme—Compulsory Contributions—Poor Law Officers' Superannuation Act, 1896 (59 & 60 *Vict. c.* 50)—*Poor Law Officers' Superannuation Act Amendment Act,* 1897 (60 & 61 *Vict. c.* 28).

A compulsory scheme for providing superannuation pensions for poor law officers and servants was established by the Poor Law Officers' Superannuation Act, 1896. Obligatory pensions were payable by the guardians and obligatory contributions by the officers and servants. The pensions were expressly made inalienable, but there was no express prohibition against contracting out:—

Held that, as the Act, though obligatory, was only intended for the benefit of a limited class of the community, namely poor law officers and servants, and contracting out was not expressly prohibited, any member of that limited class might contract himself out of his statutory rights and liabilities.

Griffiths v. *Earl of Dudley* (1882) 9 Q. B. D. 357, 364 and *Great Eastern Ry. Co.* v. *Goldsmid* (1884) 9 App. Cas. 927, 936 applied.

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ACTION.

The plaintiff had been an officer or servant in the defendants' employment from February 10, 1908, to May 19, 1922, when he retired on account of ill health.

From March 25, 1917, to March 25, 1922, the last quarter day of the five years preceding his retirement, he had received 1288*l.*, made up of 780*l.* salary and 508*l.* war bonus.

In computing the plaintiff's superannuation allowance under the Poor Law Officers' Superannuation Act, 1896, the defendants had disregarded the bonus and based their computation on the salary alone. They had in fact never deducted the statutory 2 per cent. contribution on the bonus, and on July 20, 1923, they refused a tender covering that amount.

On October 11, 1923, the plaintiff commenced this action for a declaration that the bonus must be included in the computation and for an account and payment accordingly.

The defendants, while admitting that the bonus was prima facie a statutory emolument for the purpose of the computation, proved that in their circulars offering or increasing the bonus from time to time they had invariably stated that it was made on the distinct understanding that the Superannuation Act had no relation thereto, either as regards deductions or benefits, and that they should assume that the plaintiff agreed thereto unless they heard from him to the contrary within a limited time therein stated. They submitted that as the plaintiff took no exception to any of these circulars, but accepted the bonus payments without any statutory deduction, he had to that extent by conduct contracted himself out of the Act.

The plaintiff contended that such a contract, even if made, would be ultra vires. He also submitted that his conduct did not amount to an acceptance of the defendants' conditional offers. The ultra vires point is alone reported.

Archer K.C. and *Tindal Atkinson* for the plaintiff. There is no power to contract out of the Superannuation Act, 1896. The previous Superannuation Act, 1864 (27 & 28 Vict. c. 42),

was entirely voluntary. It authorized Guardians at their discretion to grant superannuation allowances to an officer, payable to or in trust for such officer only and not assignable or chargeable with his debts or other liabilities. The officer was not called on to contribute.

The Superannuation Act, 1896, on the other hand is clearly compulsory. It is intituled "An Act to provide for superannuation allowances to Poor Law officers and servants, and for contributions towards such allowances by such officers and servants; and to make other relative provisions."

By ss. 2, 3 every officer and servant on resigning or ceasing to hold his office or employment through permanent infirmity, old age, or on attaining sixty-five, etc., "shall be entitled" to a superannuation allowance based on his salary or wages and emoluments during the five years ending on the quarter day immediately preceding his retirement.

By s. 7 an officer or servant ceasing to hold office in consequence of grave misconduct "shall forfeit all claim to any superannuation allowance," but the Guardians "may, if they see fit," return his contributions.

By s. 8 an officer or servant who has not become entitled to a superannuation allowance and who loses his office or employment for any cause other than his own misconduct or voluntary resignation, "shall be entitled" to the return of his contributions.

By s. 10 the superannuation allowance "shall be payable" to or in trust for the officer or servant and shall not be assignable or chargeable with his debts or other liabilities. Notwithstanding this section, the defendants in effect say that an officer or servant may assign his allowance to them in advance in consideration of being let off payment of his compulsory contributions.

By ss. 12, 13 every officer and servant "shall contribute annually" a certain percentage of his salary or wages and emoluments, to be deducted annually therefrom. This is clearly obligatory: *Price* v. *Eastbourne Union*. (1)

(1) [1920] 1 Ch. 535, 540.

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Sect. 15 enables an existing officer or servant within three months after the commencement of the Act (September 29, 1896) to give notice that he will not avail himself of the Act, and in that event "it shall not be obligatory on him" to make contributions nor shall he be entitled to superannuation allowance. This is the first optional method of escaping from the obligatory provisions of the Act in the case specified.

By s. 19 "Emoluments" includes all fees, poundage, and other payments made to any officer or servant as such for his own use. Having regard to the somewhat analogous cases of *Rex* v. *Lyon* (1) and *Sutton* v. *Attorney-General* (2) the defendants admit that the bonuses were statutory emoluments.

The Superannuation Act, 1897, provides that a female nurse appointed after August 6, 1897, who gives notice within two months from her appointment that she will not avail herself of the 1896 Act, "shall not be required to make any contribution . . . . and shall not be entitled" to any superannuation allowance. A female nurse appointed after September 29, 1896, and before August 6, 1897, can give a similar notice within one month of the latter date. This is the second optional method of escaping from the obligatory provisions of the Act in the cases specified.

Apart from these particular methods of escape in particular cases, the 1896 Act is so clearly obligatory that a special provision against contracting out would be pure surplusage.

Luxmoore K.C. and *Cecil Turner* for the defendants. The 1896 Act is no doubt obligatory, but it does not expressly prohibit contracting out.

Sect. 15 and the 1897 Act merely give existing officers or servants and female nurses a limited unilateral right to escape the Act. They do not impliedly negative contracting out by mutual agreement in other cases, and there is nothing else in the Act to negative it. Sect. 10 merely forbids the assignment of an actual pension. It does not touch this point.

The maxim applicable is "Quilibet potest renunciare juri pro se introducto," and unless contracting out is

(1) [1921] 1 K. B. 203. (2) [1923] W. N. 124.

prohibited by express words or by the obvious policy and intention of an Act, it is lawful to contract away private rights thereby conferred: *Griffiths* v. *Earl of Dudley* (1); *Great Eastern Ry. Co.* v. *Goldsmid* (2); *British Columbia Electric Ry. Co.* v. *Gentile* (3); *Russell* v. *Rudd* (4); *Nunan* v. *Southern Ry. Co.* (5)

Archer K.C. in reply. *Griffiths* v. *Earl of Dudley* (1) was a decision on the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). That Act merely removed the employer's defence of "common employment" to a limited extent—namely, where the common employee was a superintendent: see Cave J.'s judgment. (6) It was held that a workman might contract to take that risk. He was not forbidden to do so either expressly or by implication.

The Superannuation Act, 1896, is an entirely different class of Act. It really provides a compulsory scheme for insuring a deferred annuity which (s. 10) is inalienable. That must surely forbid alienation in futuro.

The whole policy of the Act with the limited exceptions in the case of existing officers or servants and female nurses is pure compulsion. In such a case an express prohibition against contracting out would be the merest surplusage. It is implied by the whole policy and intent of the Act. That is what the Court has to consider in construing a statute: *Eastman Photographic Materials Co.* v. *Comptroller-General.* (7)

The maxim "Quilibet potest renunciare" is not of universal application. For instance, it does not authorize a public body to waive powers given them for the public benefit, nor an individual to deprive himself by agreement of a right to protection given him by the law: Broom's Maxims, 9th ed., p. 457; *Ayr Harbour Trustees* v. *Oswald* (8); *Lee* v. *Read.* (9)

(1) 9 Q. B. D. 357, 364.
(2) 9 App. Cas. 927, 936.
(3) [1914] A. C. 1034, 1041.
(4) [1923] A. C. 309, 327.
(5) [1924] 1 K. B. 223.
(6) 9 Q. B. D. 366.
(7) [1898] A. C. 571, 575.
(8) (1883) 8 App. Cas. 623.
(9) (1842) 5 Beav. 381, 385. See also *Baddeley* v. *Earl Granville* (1887) 19 Q. B. D. 423, 426.

ASTBURY J. 1924 DEWHURST v. SALFORD GUARDIANS.

ASTBURY J. [after stating the facts and referring to the Acts of 1864, 1896 and 1897 :] The plaintiff contends that the policy of the 1896 Act, in view of its provisions, is necessarily against there being any power to contract out. He points out that these pensions to these public servants are inalienable, and that since the 1896 Act they have become compulsory, as distinct from the previous permissive pensions under the 1864 Act.

The defendants, on the other hand, contend that there is nothing in the 1896 Act to prevent a prospective pensioner from contracting out, if it be to his advantage to do so. Now these war bonuses were started in the belief that they were temporary allowances. The defendants' servants were so told, and it may very well have been to the interest of many of them to contract out if they were entitled to do so. For instance, a young man then in the defendants' employ might very well have hoped to continue in their employ for twenty or thirty years. If these war bonuses were to be temporary, as then believed, he would have had little chance of receiving bonus payments during the last five years of his service, and he might well have thought it to his interest that the 2 per cent. contribution should not be deducted for many years from previous bonus payments, which would not come into computation for his superannuation allowance.

No doubt the provisions of the 1896 Act are in terms compulsory. Sect. 2 provides that every officer and servant therein mentioned " shall be entitled " to his superannuation allowance, and s. 12 provides that every officer and servant " shall contribute " as therein mentioned.

At first sight, the 1897 Act points to the compulsory nature of the 1896 Act, as it was considered necessary to pass a special Act to the effect that any female nurse appointed after August 6, 1897, should have the right within two months of her appointment to signify her intention not to avail herself of the 1896 Act. But notwithstanding this, I am of opinion, although the matter is perhaps one of difficulty, that the 1896 Act must be regarded as a statute passed for the benefit of a limited class of the community, and that the Guardians

are bound to comply with that Act in favour of those entitled to claim its benefits. It contains provision for compulsory payment of pensions, except in cases where it was obviously necessary to make an exception. The reason for the 1897 Act may very well have been that it is customary for female nurses to take up short time appointments with these Guardians which, in many cases, might be so short as to prevent a female nurse, who left after her probationary period, from obtaining any superannuation allowance. The object of the 1897 Act may have been to prevent female nurses from being deterred from passing through their probationary period with these Guardians by compulsory deductions from their wages. They were consequently given the right, just as existing officers and servants were given the right under s. 15 of the 1896 Act, to give notice in invitum to the Guardians employing them—i.e., without the necessity of any mutual agreement—that they would not take the benefit of the superannuation allowance, or be subject to the deductions provided for in the statute.

The question is whether, notwithstanding that these statutory pensions are now compulsory instead of permissive, as under the 1864 Act, there is really anything in the 1896 Act to prevent these officers and servants contracting out, or in other words contracting away the benefits otherwise compulsorily coming to them.

Now it is the fact that neither side has been able to discover any decision in which, where benefits have been compulsorily given by a statute to individuals or limited classes without any prohibition against contracting out, contracting out has been held to be impliedly prohibited. The nearest authority is *Griffiths* v. *Earl of Dudley*. (1) That was a case under the Employers' Liability Act, 1880, which provided benefits for the persons included therein, but did not contain any provision against contracting out. Sect. 1 provided that "Where . . . . personal injury is caused to a workman"—in certain specified ways—"the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of

(1) 9 Q. B. D. 357, 364.

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compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work." A workman having contracted with his employer for himself and his representatives, and any person entitled in case of death, not to claim any compensation under the Act for personal injury, it was held that the agreement was valid. Field J. said: "I think the Court should take a broad view of the construction of the Act, having regard to the intention of the Legislature. I do not think the words of the Act go far enough to compel the construction that the express contract by the workman against the operation of the Act should not take effect. In all the cases referred to in argument, in which the Legislature has intended to enact that a person shall not be allowed to contract himself out of an Act of Parliament, very express words have been used. As a general rule entire freedom of contract has been preserved; it has only been interfered with in order to obviate great public injustice. It is legitimate to see what would be the consequences if the construction contended for by the plaintiff's counsel prevailed, because, if injustice would result, it is unlikely the Legislature intended that construction. I think great injustice would result, because the workman might obtain the benefit of the contract for years in the form of higher wages to cover the risk of injury, and then claim full additional compensation when he was injured. The strongest argument suggested in favour of the contention for the plaintiff is the desire of the Legislature to protect workmen. Protection has been afforded them against late hours of work, unfenced machinery, the employment of children in manufactories, and in other instances. If it could be shown in the present case that large classes of workmen would be deprived of the protection which the Legislature intended to give them by a decision that they could contract themselves out of the provisions of the Employers' Liability Act, a strong argument against that construction would be afforded. But that cannot be shown."

Now, I am unable to come to the conclusion that if officers and servants of these Guardians were allowed to contract

themselves out for considerations appealing to them, large classes of workmen would be deprived of the protection which the Legislature intended them to have.

In *Great Eastern Ry. Co.* v. *Goldsmid* (1) the facts of which have no relation whatever to the present case, Lord Selborne said: "It is a jus introductum for the particular benefit of the City of London, and it falls within the general principle of law, 'Unusquisque potest renunciare juri pro se introducto;' a principle not only of ancient but also of modern application, applicable even where Acts of Parliament have been passed of a much more public character. In such cases, when the rights given have been only private rights, unless there has been also in the Act of Parliament a clause excluding a power of contract, it has been held that by contract or by voluntary renunciation such rights, as far as they are personal rights, may be parted with and renounced."

The present Act being compulsory, contracting out would require a mutual agreement between the Guardians and the officer or servant. That may be the true meaning of s. 15 and the 1897 Act, where existing officers or servants and female nurses can escape from the Act by a simple notice in writing without the necessity of any mutual agreement.

No doubt there is a very great deal to be said on both sides, but on the whole it seems to me that it may be to the interest of many people employed by these Guardians to prefer employment outside the Act rather than under it, and, further, I am not satisfied that contracting out must necessarily produce evils which the Legislature intended to guard against.

In the present case the actual issue is not whether the plaintiff could contract out of the Act altogether, but only whether he could agree to receive his bonuses on the footing on which they were offered and paid to him. But the defendants must clearly go the full length of contending that there is power to contract out of the Act generally, and cannot limit that power to such exceptional cases as the payment of bonuses.

(1) 9 App. Cas. 927, 936.

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On the whole, though not without considerable hesitation, I have come to the conclusion that contracting out is not impliedly prohibited by this Act.

His Lordship then held on the facts that the plaintiff had contracted out as to the bonuses, and dismissed the action with costs.

Solicitors: *Howard & Veneer; Reid Sharman & Co., for Foyster, Waddington & Morgan, Manchester.*

G. R. A.

EVE J. 1924 *July* 15, 16, 30; *Dec.* 2.

In re G. STANLEY AND COMPANY, LIMITED.

[No. 00,585 of 1922.]

Company—Winding Up—Compulsory Order—Overdraft at Bank—Guarantor—Fraudulent Preference—Dominant Motive of Debtor—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *s.* 44, *sub-s.* 1—*Companies* (*Consolidation*) *Act,* 1908 (8 *Edw.* 7, *c.* 69), *s.* 210.

A private company, of which a father and son were the only shareholders and directors, the latter being managing director, became insolvent, and was ordered to be compulsorily wound up on November 28, 1922. Within the three months preceding this date various sums, amounting in the whole to 1503*l.* 18*s.*, had been raised by the son in certain transactions and paid into the account of the company at a bank to reduce an overdraft of the company, to secure which the father had given guarantees to the extent of 1500*l.* The liquidator of the company took out a summons against the father under s. 210 of the Companies (Consolidation) Act, 1908, to have it declared (1.) that the payment of the 1503*l.* to the bank was a fraudulent preference in favour of the father by relieving him of his liability under the guarantee; and (2.) for an order directing him to repay the money to the liquidator. There was evidence to the effect that the son hoped to keep the business of the company going by this payment into the bank and thereby to induce his father to put another 10,000*l.* or 12,000*l.* into the business, which had become hopelessly insolvent. A preliminary objection was taken by the respondent that in any event no order for repayment to the liquidator could be made:—

Held, overruling this objection, that the real object of amending s. 44, sub-s. 1, of the Bankruptcy Act, 1914, by the addition of the words "or any surety or guarantor for the debt due to such creditor" was to enable the trustee to recover the payment from the person actually preferred.

Held, further, that the object of the son in making the payment to

the bank being to procure further money being put into the business by his father it was impossible to hold such payment to be a fraudulent preference of the father over the other creditors, and the summons must be dismissed.

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G. STANLEY & Co., *In re.*

ADJOURNED SUMMONS WITH WITNESSES.

By this summons the liquidator in the compulsory winding up of a company sought a declaration against the respondent Simon Sherwinter that certain payments made to the respondent and paid into a bank to the credit of the company amounted to a fraudulent preference of the respondent over the other creditors of the company. The company of G. Stanley & Co., Ld., was incorporated on September 8, 1919, as a private company with a nominal capital of 3000*l.*, divided into 1*l.* shares, for the purpose of carrying on business as manufacturers and dealers in household and other furniture at Tottenham Court Road, London. The only shareholders of the company were the father, Simon Sherwinter, and his son, Stanley Sherwinter (known as Stanley Sherwin). They were also the two directors appointed under the articles of association of the company, the son being managing director at a salary of 500*l.* a year. The father lived chiefly in Edinburgh, and left the management of the business in London almost entirely to his son. The company was financed by means of an overdraft at Lloyds Bank, Ld., in Tottenham Court Road, and this overdraft was secured by two written guarantees of Simon Sherwinter to the extent of 1500*l.*, given in 1920. At the end of July, 1922, the overdraft at Lloyds Bank amounted to 1574*l.* 8*s.* 5*d.* On August 28 and September 18, 1922, two separate payments of 250*l.* each were made by the company to Simon Sherwinter (as the judge found on the evidence), to recoup him for sums paid for the accommodation of the company. There was also evidence that 420*l.* had been repaid by Simon Sherwinter to the bank in pursuance of his guarantee. Various other sums, amounting in the whole to 1503*l.* 18*s.*, had been raised by the son as managing director of the company, partly by loans from moneylenders and partly by speculative transactions and sales for cash at less than the cost price of certain goods, which had been obtained

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on credit and not paid for; and this total sum was paid into the bank to the credit of the company with the intention, as the liquidator alleged, of relieving the respondent, Simon Sherwinter, from his liability under the guarantees. All these payments were alleged to be fraudulent preferences in favour of Simon Sherwinter within s. 210 of the Companies (Consolidation) Act, 1908. On November 20, 1922, a petition was presented by a creditor against the company asking for a compulsory winding-up order, and on November 28, 1922, the compulsory order was made, and John Baker was appointed liquidator. On August 2, 1923, the liquidator took out a summons and claimed a declaration: (1.) that the two sums of 250*l.* made by the company on behalf of Simon Sherwinter, and the sum of 1503*l.* 18*s.* paid to Lloyds Bank to the credit of the company between August 28, 1922 and the date of the winding-up order, so as to relieve S. Sherwinter of his liability under the guarantee, amounted to a fraudulent preference of Simon Sherwinter over the other creditors of the company within s. 210 of the Companies (Consolidation) Act, 1908, and were fraudulent, and were invalid accordingly; and (2.) that Simon Sherwinter should be ordered to repay these sums to the liquidator. The company was admittedly insolvent at the date of the petition, the liabilities being 30,000*l.* and the assets about 3000*l.* The father and son gave evidence, from which it appeared that the father living at Edinburgh practically left the entire management of the business in London to the son. The latter gave evidence that the money borrowed from moneylenders and raised by means of certain other transactions was paid into the bank in order to keep the business going, and to induce his father to put another 10,000*l.* or 12,000*l.* into the business, as he had contemplated doing. In his points of defence the respondent did not admit the main allegations of the points of claim and contended that they disclosed no ground for relief against him.

Clayton K.C. and *Tindale Davis* for the liquidator. The company was clearly insolvent when these payments complained of were made with the view of relieving the guarantor

of his liability to the bank. *In re Paine* (1); *In re Blackpool Motor Car Co.* (2) The decisions in the two cases of *In re Mills* (3) and *In re Warren* (4) gave rise to the additional words " or any surety or guarantor for the debt due to such creditor " being inserted in s. 44, sub-s. 1, of the Bankruptcy Act, 1914; but the exact point now raised in this case does not appear to have been decided.

Bennett K.C. and *G. W. H. Jones* for the respondent, took the preliminary objection that even if this payment to the bank amounted to a fraudulent preference, no such order as was asked for repayment of this sum by the respondent to the liquidator could be made. The Court could only declare the payment void.

Clayton K.C. in reply.

Cur. adv. vult.

July 30. EVE J. delivered the following written judgment on the preliminary objection:—

By this summons the liquidator of G. Stanley & Co., Ld., asks in substance for a declaration that the payments to the respondent, Simon Sherwinter, of two sums of 250*l.* each and the payment to the credit of the company's account with Lloyds Bank of various other sums amounting to 1503*l.* 18s., were made when the company was insolvent and within three months of the winding up, with a view of giving the said respondent a preference over the other creditors of the company, and ought to be deemed fraudulent and void as against the applicant, and for payment by the said respondent of the said sums of 250*l.*, 250*l.*, and 1503*l.* 18*s.* The respondent does not dispute that the payments were made within the three months and that the company was insolvent, but he denies that any of them were made with a view of giving him a preference over the other creditors, and he argued that in any event the liquidator is not in the circumstances entitled to any order against him for payment of the moneys paid to the company's credit at the bank.

(1) [1897] 1 Q. B. 122.
(2) [1901] 1 Ch. 77
(3) (1888) 5 Morrell's Bank. Cas. 55.
(4) [1900] 2 Q. B. 138.

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Upon the evidence it was made clear that no case of undue preference could be established in respect of either of the two sums of 250*l*. They were paid to the respondent to recoup him for moneys disbursed by him to take up acceptances for the accommodation of the company, the proceeds of which less discount had previously been paid to the company.

The facts relating to the moneys paid to the bank are quite distinct. The respondent and his son were the sole shareholders and only directors of the company, and the former had guaranteed the company's overdraft at Lloyds Bank to the extent of 1500*l*. It is proved that by recourse to a registered moneylender and by selling for cash at less than cost price goods obtained on credit, sums amounting to 1503*l*. 18*s*. were raised and paid to the bank, and it is alleged that such payments were made with intent to benefit the respondent by reducing his liability under the guarantee and amount to a fraudulent preference. The respondent was in fact called upon to pay the bank 420*l*. and upwards under the guarantee, and is therefore a creditor of the company in respect of that payment.

It is to be observed that the proceedings are not framed as a misfeasance summons seeking to make the respondent liable as a director, but are based expressly on s. 210 of the Act of 1908. In these circumstances counsel on behalf of the respondent submitted at the close of the applicant's evidence that there was no case made out in respect of the two sums of 250*l*., and that even if the Court came to the conclusion that the payments to the bank were made with a view to giving the respondent a preference, it could only declare the payments fraudulent and void and could not give effect to the declaration by ordering the respondent to pay the amounts to the applicant.

In order to appreciate this submission it is necessary to read the first sub-section of s. 44 of the Bankruptcy Act, 1914. It is in these terms: "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as

they become due from his own money in favour of any creditor, or of any person in trust for any creditor, with a view of giving such creditor, or any surety or guarantor for the debt due to such creditor, a preference over the other creditors, shall, if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

Now the creditor to whom the payments were made in this case was the bank, the creditor to prefer whom the payments are alleged to have been made was the respondent, he being guarantor for the debt due to the bank. It is common ground that the words " or any surety or guarantor for the debt due to such creditor " were inserted in the sub-section I have just read in consequence of the decisions in the two cases of *In re Mills* (1) and *In re Warren.* (2) In the former of these cases an attempt to make the creditor to whom the payment was in fact made refund on the grounds that the payment had been made with intent to prefer the guarantor of the debt, failed, because the person sought to be made liable, although he had received the money, was not the person whom it was intended to prefer. It was intended to prefer another person—namely, the surety for the debt thus paid. In the second case the application was made against the surety, but this also failed, because the payment, having been made to the principal creditor, was held not to have been a payment to or in favour of the respondent.

The effect of the two decisions therefore was this, that a payment to a person whom it was not sought to prefer could not be recovered from him, because there was no fraudulent preference so far as he was concerned, nor from the person whom it was sought to prefer, because the payment was not made to him. The result was that a payment to the principal creditor with the intent to prefer the guarantor of the debt so paid could not be recovered either from the principal creditor or the guarantor, and it was to remedy

(1) 5 Morrell's Bank. Cas. 55. (2) [1900] 2 Q. B. 138.

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this anomaly that the words I have already quoted were introduced into the Act.

At the hearing I was impressed with the argument advanced on behalf of the respondent, that the statute only contemplated the setting aside of the payment, but further consideration of the authorities has convinced me that the real object of the amendment of the section was to enable the trustee to recover the payment from the person actually preferred. Accordingly I overrule the preliminary objection raised on behalf of the respondent, and the summons must be restored for further hearing on an early day next sittings. I must treat it as part heard next sittings.

On December 2, 1924, the further hearing of the summons came on upon the question whether or no the payment to the bank constituted a fraudulent preference within the Act.

Clayton K.C. and *Tindale Davis* for the liquidator. The facts are not disputed. The four things required by s. 44, sub-s. 1, of the Bankruptcy Act, 1914, have been satisfied in this case, and in particular the money paid into the bank was made "with a view to prefer" the father, Simon Sherwinter, by reducing his liability under the guarantee to the bank. The suggestion that it was made in order to induce the father to put further capital into the business is an afterthought, and is not stated in the points of defence, but even if true it does not alter the rights of the liquidator under the statute to have the preference declared void. It is not now necessary that the payment should be given with the "sole view" of preferring a particular creditor: Williams' Bankruptcy, 12th ed., p. 298; *Ex parte Topham* (1); *Ex parte Griffith* (2); *Ex parte Hill* (3); *In re Bell* (4); *Sharp* v. *Jackson*. (5) It is enough if it is the substantial, effective or dominant motive or "view." That last word implies a foreseeing of the consequences of the transaction. *Gaslight Improvement Co.* v. *Terrell* (6) was a case of undue

(1) (1873) L. R. 8 Ch. 614.
(2) (1883) 23 Ch. D. 69.
(3) (1883) 23 Ch. D. 695.
(4) (1892) 10 Morrell's Bank. Cas. 15.
(5) [1899] A. C. 419.
(6) (1870) L. R. 10 Eq. 168.

preference being made to a director for a debt due to him from the company. Here the business was carried on in a grossly swindling manner, and the payment to the bank was a clear case of preference for the purpose of assisting the father. The liquidator was fully justified in inquiring into it.

Bennett K.C. and *G. W. H. Jones* for the respondent. The onus of proof lies upon the person attacking a transaction such as this to make out that the governing motive was to prefer one creditor to another. In *In re Lake* (1) the presumption that a payment was made with the dominant view of preferring a creditor was held to be negatived by proof that the money was paid to make good a breach of trust. So here, the real reason of the payments to the bank made by the son, as manager of the company, was to keep the business alive in order that he might get his father to put another 10,000*l.* or 12,000*l.* into it. That, on the evidence, was Stanley Sherwin's dominant "view," not to prefer his father, but to bolster up the business. If that is established it disposes of any case of fraudulent preference, and negatives the presumption that the payments were made to prefer the surety to the bank. The applicant has failed to discharge the onus cast upon him, and the summons should be dismissed.

EVE J. said that in the investigation which followed the winding up of the company certain very discreditable and highly reprehensible transactions were disclosed. [His Lordship stated these transactions and the other facts in the case.] The liquidator not unnaturally regarded the transactions as so suspicious and discreditable, as to raise the presumption that they were carried out in order to swell the banking account, and thereby to reduce the overdraft and relieve the father under his guarantee. The net result of the transactions during the three months was to bring about a material decrease of the overdraft. The liquidator was fully justified in launching the summons, but before the Court

(1) [1901] 1 K. B. 710.

EVE J. 1924 G. STANLEY & Co., *In re.*

can act on the presumption which has been raised it must first be satisfied that the presumption—which like every other presumption is capable of being rebutted—has not in fact been rebutted by the subsequent investigations. According to the respondent's case, that presumption had been rebutted. It was evident that the father had taken no controlling part in the management of the business and the son had proved himself to be quite incompetent to manage it. He hoped that his father would come to the rescue, and in fact his father was at that time actually contemplating putting a further sum of 10,000*l.* or 12,000*l.* into this business until dissuaded from any such course by the advice of a Scotch accountant. The question was whether it had been established to the satisfaction of the Court that there was any idea of the son's giving a preference to the father. On the evidence, his Lordship could not come to that conclusion; on the contrary, the son was contemplating drawing his father further into the mire. In these circumstances it was impossible to hold that this payment into the bank was a fraudulent preference. The summons would be dismissed, but there would be no order as to costs, except that the liquidator should get his out of the assets.

Solicitors: *H. H. Wells & Co.; Raphael, Zeffertt & Co.*

G. M.

RUSSELL J.
1924
Oct. 31.

In re BATES.

SELMES *v.* BATES.

[1924. B. 3280.]

Will—Construction—Gift of Annuity—"Such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 2000l."—Super Tax—Finance Act, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 3.

By his will made in 1923 a testator gave to his wife "such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 2000*l.*" :—

Held, that the wife was entitled to the 2000*l.* free of income tax only, and was not entitled to payment of any sum in respect of super-tax.

In re Crawshay [1915] W. N. 412 followed.

By his will, dated February 7, 1923, the testator appointed his wife and the plaintiffs to be his executrix, executors and trustees. After bequeathing various specific legacies, he gave to his wife "such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 2000*l.*," such annuity to commence from his death and to be payable (by equal quarterly payments, the first payment to be made at the expiration of three calendar months after his death) out of the income of his residuary estate as thereinafter mentioned, and he directed that his trustees should pay out of his residuary estate all the duties payable in respect of any legacy or annuity bequeathed free of duty, and he gave his residuary estate to his trustees in trust during the lifetime of his wife to receive the annual income thereof, and thereout to pay "to her the said clear annual sum or annuity of 2000*l.* bequeathed to her as aforesaid." The testator died on September 14, 1923. The plaintiffs took out this summons asking whether, upon the true construction of the will, the widow was entitled under the bequest of the annuity to have paid any and what sum provided for her benefit in respect of super-tax.

J. E. Harman for the plaintiffs.

Ashworth James for the annuitant. The authorities on

RUSSELL J. 1924 BATES, *In re.* SELMES *v.* BATES.

the point raised here are not in accord. In *In re Crawshay* (1) Peterson J. held that the annuitant was not entitled to receive her annuity free of super-tax, but in that case the will had been made before super-tax was thought of. In this case the super-tax limit was down to 2000*l.* before the will was made. In *In re Crosse* (2), where the words were not so much in favour of the annuitant as the words we have here, Astbury J. held that the annuity was to be paid free of super-tax as well as of income tax, on the ground that super-tax was merely an additional income tax. Again in *In re Doxat* (3) Sargant J. held that the residuary estate would have to bear such proportion of the total super-tax payable by the annuitant as the annuity with the income thereon added thereto bore to the total amount of her income assessed for the purposes of super-tax. It is reasonable to suppose that where a will, made after the imposition of super-tax, gives an annuity free of income tax, it includes super-tax. It must mean that the annuity is to be free of super-tax as well as of income tax.

C. V. Rawlence for the residuary estate. On the wording of the will, the annuitant ought to bear the burden of the super-tax. As Peterson J. points out in *In re Crawshay* (1) super-tax is not payable in respect of any one sum, but is imposed on the whole income of the person subject thereto. The judgment in that case is to be preferred to the judgments in the other two cases that have been cited.

RUSSELL J. This summons raises quite a short point, but one not free from difficulty in view of the authorities that have been cited to me. The question to be decided is whether the annuitant is entitled to receive her annuity not only free of income tax, but also of super-tax. The words of the will must be borne in mind. The testator has not said that the annuitant is to be paid her annuity free of income tax. What he has said is that she is to be paid such a sum in every year as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 2000*l.*

(1) [1915] W. N. 412. (2) [1920] 1 Ch. 240.
(3) [1920] W. N. 262.

In none of the authorities that have been cited to me were the words the same as we have here. In *In re Crawshay* (1) the testator by his will gave his wife an annuity of 1500*l.* " free of all deductions except income tax." By a first codicil he gave her such a sum as together with the income for the time being received by her under the will would make up an annual sum of 2000*l.* " clear of all deductions including income tax," and by a second codicil he declared the amount to be paid his wife should be increased to the annual sum of 2500*l.* " clear of all deductions including income tax." It has been pointed out that the will and codicils in that case were made before super-tax was ever heard of, but I do not think that that affected the decision of Peterson J. The summons asked whether, having regard to the terms of the first and second codicils, the trustees of the testator's will should pay out of the income of his residuary estate any and what part of the super-tax payable by the widow in respect of the income received by her from all sources. The judgment of Peterson J. was short. He referred to decisions that the gift of an annuity " free from all deductions " would not free the annuitant from liability to pay income tax, and that unless income tax were expressly included in the term " deductions," the annuitant would have to pay it, and said that " trustees who had to pay an annuity were accountable for the income tax, and in the ordinary course would, for the purpose of meeting their accountability, deduct the income tax before payment and only hand over the balance to the annuitant. In the present case his Lordship thought the testator treated income tax as a deduction and, by the directions in the codicil, meant ' I direct that nothing shall be deducted from the sum given, not even income tax.' In his Lordship's opinion what the testator was considering when he gave the sums in question was the income tax for which the respective trustees would be accountable in respect of the particular annuity or sum. Now super-tax was not a charge in respect of any particular annuity or sum, but was a charge in respect of the recipient's whole income and was not a matter

(1) [1915] W. N. 412.

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with which the trustees would be charged or concerned at all, and, in his opinion, what the testator had done was to give the widow the yearly sum of 2500*l.* clear of all deductions for which the trustees were accountable, but that did not include super-tax, which she must pay herself." I think the ground of that decision was that the 2500*l.* was to be paid clear of all deductions for which the trustees were accountable, and that super-tax being a deduction for which they were not liable was therefore payable by the widow. I see nothing to quarrel with in that decision. The next decision is *In re Crosse.* (1) In that case Astbury J. came to the conclusion that on the terms of the will the testator had directed the amount to be paid should be free of income tax, and that as super-tax was an additional income tax the amount was to be paid free of that tax also. That decision does not affect the present case, the words being altogether different. Then came *In re Doxat.* (2) There again the words were different to those that we find in the present case. The testator gave his wife an annuity of 2500*l.*, "free of income tax and all other deductions." Sargant J. said that "the testator knew that after his death his widow would be subject to some super-tax. Super-tax, according to statute, was only additional income tax. The difference between the two was in the mode of collection, and apart from that the legal positions of the two taxes were substantially the same. That being so, it would be curious if the words 'all other deductions' should be held to diminish the force of the previous words. *In re Crawshay* (3) did not establish any general principle, and the language of the will there was different from that of the codicil before him. Supposing that income tax was partly paid and partly deducted, both sums would have to be regarded. The widow was entitled to the naked amount of the annuity free from income tax and super-tax. And, following *In re Bowring* (4), his Lordship held that the income of the residuary estate must bear such proportion of the total super-tax payable by the widow as

(1) [1920] 1 Ch. 240.
(2) [1920] W. N. 262, 263.
(3) [1915] W. N. 412.
(4) [1918] W. N. 265.

the annuity, with the income tax thereon added thereto, bore to the total amount of her income assessed for the purposes of super-tax." That decision is, that where there is a gift of an annuity free of income tax and all other deductions, the annuity is to be paid free of income tax and super-tax. But here the words are different. Here the words are, "such a sum as after deduction of the income tax for the time being payable in respect thereof will leave a clear sum of 2000*l.*" No super-tax is really payable "in respect of" this sum. The question is, did the testator mean that only income tax "in respect thereof" was to be deducted, and that super-tax was not to be deducted? I think that the testator did not intend that in addition to income tax being deducted a proportion of the super-tax payable by his wife in respect of her total income should also be deducted.

I hold accordingly that the annuity is to be paid free of income tax only, and there will be a declaration that the widow is not entitled to payment of any sum in respect of super-tax.

Solicitors: *Williams & James, for Dawes, Son & Prentice, Rye.*

P. J. B.

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In re EARL OF STAMFORD AND WARRINGTON.

PAYNE *v.* GREY.

[1909. S. 156.]

Settled Land—Encumbered Estate—Term vested in Trustees—Trusts for Management and Payment of Encumbrances—Application by Tenant for Life to be let into Possession—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 22 (*ii.*).

The applicants, who together had the powers of a tenant for life of a settled Lancashire estate, subject to a term of a thousand years, claimed that, subject to their giving proper undertakings, including one to pay the net income of the estate to the trustees of the term, they were entitled to be let into possession of the estate. The trusts of the term were, first, to pay off the encumbrances on three estates out of the rents and profits of the Lancashire estate, and then to pay off the encumbrances on the Lancashire estate out of the same rents and profits.

When all the encumbrances had been paid off the term was to come to an end. All encumbrances, except those on the Lancashire estate, had now been paid off. The will gave the trustees wider powers of management than the Settled Land Acts gave the tenant for life, and it was admitted the estates had been efficiently managed by the trustees. There was no evidence that it would be more beneficial to the estate to let in the applicants than to leave it in the hands of the trustees. The trustees had power to sell the Lancashire estate, and to apply the proceeds in paying off encumbrances on that estate, but there was in terms no provision for recouping capital the sum so discharged out of capital instead of out of rents and profits. Under an order of Stirling J. dated December 4, 1895, any corpus of the Lancashire estate, expended in paying off a mortgage on that estate, must be recouped out of the rents and profits of the estate, and the mortgage kept on foot for the benefit of the estate :—

Held, that the applicants were not entitled as of right to be let into possession, and that the most beneficial way of dealing with the Lancashire estate was to refuse the application and continue the trustees in their management, and that, notwithstanding the existence of the term, the applicants could exercise the powers of a tenant for life under the Settled Land Acts, including the power to give directions under s. 22, sub-s. 2, of the Settled Land Act, 1882.

Held, also, that the order of Stirling J. was good until discharged, and therefore the trustees must keep records in their accounts of mortgages paid off otherwise than out of the rents and profits of the Lancashire estate, although they need not take a transfer to special trustees of mortgages so paid off; but *semble*, the provision for recoupment was bad, as it involved accumulation beyond the lawful period.

ADJOURNED SUMMONS.

The applicants, Lady Catherine Sarah Grey and

Mrs. Katharine Henrietta Venezia Grey, applied to be let into possession of certain settled estates. The matter arose under the will of the seventh Earl of Stamford, who made his will on June 26, 1875, and died on January 2, 1883. He had four estates, called in the will shire estates, in Staffordshire, Leicestershire, Cheshire, and Lancashire respectively, which he gave to the trustees of his will during the life of his wife for her benefit and settled, after the expiration of her life estate, on legal limitations. The testator's wife died on January 29, 1905. Lady Grey was the first tenant for life of the Staffordshire estates, and Mrs. Grey of the Leicestershire estates. The disposition of the Lancashire estates was as follows: "To the use of the said Arthur Frederick Payne Robert Cook and Henry Hall (his trustees) their executors administrators and assigns for the further term of one thousand years (from the expiration of the said estate hereinbefore limited therein upon trust for the benefit of my said wife as aforesaid) upon the trusts and for the intents and purposes hereinafter expressed and declared of and concerning the said term and from and after the expiration or other sooner determination of the said term of one thousand years and in the meantime subject thereto and to the trusts thereof as to one moiety of the Lancashire estates to such uses for such estates and subject to such powers and provisions as are herein expressed and declared of and concerning the Staffordshire estate and as to the other moiety of the Lancashire estate to such uses for such estates and with and subject to such powers and provisions as are herein expressed and declared of and concerning the Leicestershire estates."

At the testator's death all the shire estates were heavily encumbered. The trusts of the one thousand years term were: "Upon trust that my trustees do and shall (after payment of all rent-charges and other annual sums if any charged upon the Lancashire estate or any part thereof) apply the rents and profits of the Lancashire estate in aid of my personal estate not hereby specifically bequeathed and in the first place in or towards the discharge and satisfaction of my funeral and testamentary expenses and debts and the

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legacies and annuities given by this my will or any codicil thereto and not specifically provided for and in the next place after such funeral and testamentary expenses and debts and legacies and annuities shall have been fully satisfied then and not till then in or towards the discharge and satisfaction of the mortgage debts and other gross sums charged upon the said four shire estates or any or either of them or any part thereof respectively at the time of my decease and which shall for the time being remain unpaid." The testator directed that the mortgages on the Staffordshire estates should be first paid off, then those on the Leicestershire estates, and then those on the Cheshire estates. "And when all the last-mentioned mortgage debts and gross sums shall have been fully satisfied and discharged then the said rents and profits shall be applied lastly in or towards satisfaction of the mortgage debts and gross sums charged upon the Lancashire estate . . . . and I direct that when all my funeral and testamentary expenses debts legacies annuities mortgages and gross sums shall have been fully discharged and satisfied the said term of one thousand years shall absolutely cease and determine . . . . the subsistence of the said term of one thousand years shall not prevent or hinder my trustees or trustee from selling exchanging mortgaging or otherwise disposing of the whole or any part of the Lancashire estate for any purpose for which such sale exchange or other disposition is hereinafter directed or authorised to be made And any such sale exchange or other disposition unless expressly made subject to the said term of one thousand years shall have preference to and priority over the said term." Wide powers of management during the minority of any tenant for life or in tail were given to the trustees, including powers to fell timber and work mines, to accept surrenders of leases, and "to make such payments or contributions to charitable benevolent or public purposes and to pay such pensions rewards and gratuities to any servant tenant or other employee on the same settled estate as they or he shall consider reasonable and proper." The trustees were also given power to apply a sum for the maintenance and education

of a minor. The testator directed that on the expiration of his wife's life estate his trustees "shall enter into possession of the rents and profits of the Lancashire estate and do and shall during the continuance of the said term of one thousand years manage or superintend the management of the same shire estate in the manner and with the powers hereinbefore expressed and contained with respect to the management of the said three settled estates respectively during minorities and do and shall during the continuance of the said term apply the rents and profits of the Lancashire estate in manner hereinbefore directed in that behalf."

Then follows a series of powers to the trustees as to all four shire estates to grant leases for twenty-one years, to lease mines and quarries, to grant building leases for 999 years, and to grant conveyances in fee on chief rent. A power of sale and exchange was given to the trustees in respect of all four shire estates. As to the four it was to be exercisable, during the life of the wife, with her consent, and as to the Lancashire estates it was to be lawful for the trustees during the continuance of the term of one thousand years, at their or his discretion, to sell or exchange.

Then it was provided: "It shall be lawful for the said Arthur Frederick Payne Robert Cook and Henry Hall . . . . to apply any money to arise from any such sale . . . . in or towards paying off or discharging any mortgage or other charge or encumbrance for the time being affecting all or any of the hereditaments then subject to the then subsisting uses or trusts of the same shire or settled estates or estate but without benefiting one settled estate at the expense of another and without changing or altering the equities or obligations of the parties claiming under this my will as to defraying the fines and expenses of such renewals of leases or grants as aforesaid."

On December 4, 1895, Stirling J. ordered that after the expiration of the life interest of the testator's widow the rents and profits of the Lancashire estate, during the continuance of the thousand year term, should be applied "for the purpose of recouping to each of the said shire estates

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the amount of any encumbrance affecting such estate which may have been paid off or discharged out of capital moneys arising from sales under the power of sale contained in the said will of hereditaments forming part of such estate or which may hereafter be paid off out of moneys arising in respect of such estate (whether arising under the said power of sale contained in the said will or arising under the Settled Land Acts or otherwise) and applicable for that purpose."

The trustees therefore, on paying off a mortgage on the Lancashire estate out of the proceeds of sale of a part of that estate, kept the mortgage alive by taking a transfer of the mortgage debt and security to special trustees.

On May 4, 1905, Warrington J. made an order: "The Court declares that according to the true construction of the testator's will the respective defendants, Dame Catherine Sarah Lambert (Lady Grey), and Katharine Henrietta Duncombe (Mrs. Grey), take legal estates for life for their separate use without power of anticipation in the Staffordshire and Leicestershire estates devised by the said will and that the aforesaid two defendants together constitute the person having the powers of a tenant for life within the meaning of the Settled Land Acts 1882–1890 of the Lancashire estate devised by the said will from the death of the testator's widow notwithstanding the term of a thousand years thereby limited to the trustees upon the trusts therein declared."

The summons asked (1.) that the applicants, who together constituted the person having the powers of a tenant for life of the Lancashire estate under the Settled Land Acts, should be let into possession; and (2.) for a declaration that the applicants had power under s. 22, sub-s. 2, of the Settled Land Act, 1882, to direct the investment or application of capital moneys accruing in respect of the said estate, and in the hands of trustees for the time being for the purposes of the Settled Land Acts of the settlement of the said estate, in discharging encumbrances on the said estate, and that the trustees were not entitled or bound to keep the encumbrances alive for the benefit of remaindermen entitled to the said estate or otherwise.

Preston K.C. and *G. D. Johnston* for the applicants. The applicants are legal tenants for life and are entitled to be let into possession, notwithstanding the existence of a term of years and a trust to apply all rents and profits in the reduction of encumbrances. They are also entitled to direct that encumbrances shall be paid off out of capital in the hands of the trustees, although the testator has directed that they shall be paid off out of rents and profits and in spite of the remaindermen being prejudiced: *In re Richardson* (1); *In re Wilkinson* (2); *In re Money Kyrle's Settlement* (3); *In re Lord Coleridge's Settlement* (4); *In re Hunt's Settled Estates.* (5) *In re Richardson* (1) and *In re Money Kyrle's Settlement* (3) were both cases where estates were subject to a term in trustees to manage and apply the net income in paying off mortgages. In the first case the Court let into possession the person having the powers of a tenant for life, and in the second case the tenant for life, on their undertaking to perform the trusts of the term.

Having regard to the Settled Land Acts the presumption is that the applicants should be let into possession and the onus is on the trustees to show that they should not: *In re Wythes.* (6) In the case of equitable tenants for life it is for the Court, after considering all the circumstances, to decide whether they shall be let into possession or not.

The order for recoupment made by Stirling J. on December 4, 1895, is bad. A trust for the payment of debts is good, and no question of perpetuity arises: *In re Earl of Stamford and Warrington.* (7) That is an exception to the rule that you may not accumulate for more than twenty-one years, but a trust for the recoupment of capital is not within the exception, and is bad: *Tewart* v. *Lawson* (8); *In re Heathcote.* (9)

In this case the trustees, by the transfer of the mortgages to special trustees, seek to prolong the term after all the

(1) [1900] 2 Ch. 778.
(2) (1901) 85 L. T. 43.
(3) [1900] 2 Ch. 839.
(4) [1895] 2 Ch. 704.
(5) [1905] 2 Ch. 418, 425.
(6) [1893] 2 Ch. 369, 374.
(7) [1912] 1 Ch. 343, 368.
(8) (1874) L. R. 18 Eq. 490.
(9) [1904] 1 Ch. 826.

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mortgages have been paid off. The applicants, if required, are prepared to give an undertaking similar to that given in *In re Money Kyrle's Settlement.* (1)

Dighton Pollock, for the second tenant for life of the Staffordshire estate, and of half the Lancashire, and *Swords*, for Mrs. Hoare, the first tenant for life in remainder of the Leicestershire estate, and of a moiety of the Lancashire estate, supported the application.

G. B. Hurst K.C. and *A. L. Ellis* for the plaintiffs, the trustees. There is no rule that tenants for life are, as a matter of course and without consideration of all the circumstances, entitled to be let into possession: *In re Newen.* (2) The application is addressed to the judicial discretion of the Court. In exercising that discretion the Court considers the convenience of the parties, the question of expense and the like circumstances: *In re Bagot's Settlement.* (3) The main point to consider is whether the letting into possession will be for the benefit of the estate: *In re Richardson.* (4)

In those cases and also in *In re Wythes* (5), and *In re Money Kyrle's Settlement* (1), the ground for letting the tenant for life into possession was that by doing so the economical and efficient management of the estate was advanced. None of the elements which have induced the Court to accede to such an application as this are present in this case.

Bennett K.C. and *H. T. Method* for the infant tenant in tail in remainder of the Leicester and of a moiety of the Lancashire estate, subject to Mrs. Hoare having no children. The Court considers what is most beneficial to the estate. In *In re Richardson* (4) the tenant for life had power to grant leases, while the trustees had not. In *In re Money Kyrle's Settlement* (1) the tenant for life was already in possession of the larger portion of the settled estate and applied to be let into possession of the remainder, and in *In re Wilkinson* (6) the only question was whether the trustees or the tenant for life should collect ground rents.

(1) [1900] 2 Ch. 839.
(2) [1894] 2 Ch. 297.
(3) [1894] 1 Ch. 177.
(4) [1900] 2 Ch. 778.
(5) [1893] 2 Ch. 369.
(6) 85 L. T. 43.

In this case the powers of the trustees are wider than the powers under the Settled Land Acts, for example, they can grant fee farm rents and leases for a longer period than is allowed by the Acts, and they also have power to subscribe to charitable and public objects and to grant pensions to employees on the estate.

As to question 2 the terms of the declaration asked for are too wide and, if granted, any direction of the tenant for life would bind the trustees, even although the tenant for life, who acts in a fiduciary capacity in directing the application of capital moneys, had not considered the interests of all the persons interested under the settlement.

P. M. Walters, for the tenant for life in remainder expectant on the death of the survivor of Mrs. Grey and Mrs. Hoare, and in default of issue of Mrs. Hoare, submitted the applicants ought not to be let into possession.

RUSSELL J. [after stating the facts]. Subject to the term of a thousand years Lady Grey is tenant for life of one undivided moiety of the Lancashire estate and Mrs. Grey of the other moiety. They are not tenants for life within the meaning of the Settled Land Acts, but only persons having the powers of a tenant for life. The trust of the thousand year term is to pay off the encumbrances on the shire estates out of the rents and profits of the Lancashire estate. The trustees have also power to sell, and to apply the proceeds in paying off mortgages on the Lancashire estate, but there is in terms no provision in the will for recouping capital the amount of the encumbrance so paid off out of capital instead of out of the rents and profits. Some nineteen years after the death of the testator the applicants ask to be let into possession, that is, they ask me to take the management of the Lancashire estates out of the hands of the trustees and to put it into theirs, upon their giving to the Court sufficient and proper undertakings, including one to pay to the trustees, after paying the expenses of management, the surplus rents and profits, to be applied by them upon the trusts of the one thousand years' term.

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One of the objects of the application, as was stated by counsel, is to accelerate the determination of the thousand year term, and one of the ways in which that might possibly be done would be to sell part of the Lancashire estate and apply the proceeds in paying off the encumbrances on that estate. It was also suggested that the determination of the term would be accelerated by the economies which the applicants would effect by their management, with the result that there would be more rents and profits available for the payment off of encumbrances. It is conceded that the estate has been most efficiently managed by the trustees since the testator's death, although not throughout by the same persons who are now trustees. Of the present trustees Mr. Payne, a brother of the applicant, Lady Grey, has acted since 1896; Mr. Bateson, son-in-law of Mrs. Grey, since 1911, and Sir Edward Henry since 1919. No charge of any kind is made against the trustees on account of their management. The powers of management conferred by the will which the trustees have exercised continuously for a long period are more extensive than the powers of a tenant for life under the Settled Land Acts. The three shire estates, other than the Lancashire estate, are now free from all encumbrances which have been discharged out of the rents and profits of the Lancashire estate. Of the encumbrances which existed at the date of the testator's death only those on the Lancashire estate remain, and those amount to about 300,000*l.* A reliable estimate is that it will take from fifteen to twenty years to pay off that sum out of the rents and profits of the Lancashire estate. The applicants now claim the right, as legal tenants for life, to be let into possession on giving proper undertakings, including an undertaking to pay to the trustees of the thousand year term the net income of the estate. It is true the applicants are legal tenants for life, but their legal estate is subject to the existing term of one thousand years and is to that extent reversionary. If the trusts of the testator's will are carried out in accordance with his express wishes, they will receive no income from the Lancashire estate for some fifteen or twenty years.

It seems to me that they have put their claim too high in saying that they are entitled, upon offering proper undertakings, to be let into possession. This is not the simple case of an equitable tenant for life, who is the only person beneficially interested in possession, coming to the Court and saying: "Let me manage and go into occupation of my own property, which I am only kept out of because the legal estate is in the trustees." This is really the case of a person coming to the Court and saying: "Accelerate my interest, although the testator has said that I am not to get any income until the term of one thousand years has come to an end. Notwithstanding that allow me to go into possession before the time has arrived, and allow me to undertake the management of the estate in order to produce the rents to extinguish the encumbrances."

A number of authorities have been cited. *In re Wythes* (1); *In re Bagot's Settlement* (2); and *In re Newen* (3) were the ordinary cases of equitable tenants for life.

The three cases principally relied on by Mr. Preston are *In re Richardson* (4); *In re Money Kyrle's Settlement* (5); and *In re Wilkinson.* (6) It seems to me that the true view of the authorities is that the applicants (and for this purpose I treat them as if they were equitable tenants for life) are not entitled as of right to be let into possession. It is a question for the Court to decide in the exercise of its judicial discretion and having regard to the facts of each particular case. The true effect of the Settled Land Acts legislation is, as Chitty J. pointed out in *In re Bagot's Settlement* (2), merely to afford an additional reason enabling the Court to exercise its judicial discretion in favour of a tenant for life.

In deciding whether an applicant should be let into possession, the principal thing to consider is whether the best way of dealing with the property is to let him in. I adopt the view of Stirling J. in *In re Richardson* (7), where

(1) [1893] 2 Ch. 369.
(2) [1894] 1 Ch. 177.
(3) [1894] 2 Ch. 297.
(4) [1900] 2 Ch. 778.
(5) [1900] 2 Ch. 839.
(6) 85 L. T. 43.
(7) [1900] 2 Ch. 778, 785.

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he says: "Looking at the manner in which this discretion has been exercised since the Settled Land Act, 1882, I think that the most beneficial way in which this property can be dealt with is by letting the applicant into possession, upon his giving proper undertakings as to the performance of the trusts of the term." The learned judge relied on the fact that under the trusts of the settlement the trustees had no power to grant leases whereas the applicant had. He therefore came to the conclusion that the most beneficial way of dealing with the property was to let the applicant into possession. In the present case the trustees have managed efficiently, no complaint is made against them, and they have the fullest powers, powers exceeding those of a tenant for life. Moreover at the moment the applicants are not entitled under the provisions of the will to any of the income, and they may not be entitled to it for fifteen or twenty years; as that may be a period longer than their own lives they may never be entitled to it. There has been no attempt to show by evidence that if the applicants are let into possession the result, in the management of the estate, will be more beneficial to any one. It is true that counsel suggested that there would be economies, principally as to costs. The stress of that was so much felt that an undertaking was offered to charge only one solicitor's set of costs in each transaction. The only evidence, if it can be called by that name, is an affidavit of the applicants' country solicitor, who contents himself with saying that it would be expedient in the interests of all parties to let the applicants into possession. That seems to me to be the thinnest of material on which to make such an application to the Court. On the other hand, in considering the well-being and beneficial management of the estate I must remember that the powers of the trustees are not only most extensive and complete, but in many respects larger than the powers under the Settled Land Acts. Further the trustees have power while managing the estates to contribute to public or charitable objects, and to pay pensions and gratuities to old servants or tenants of the estate. That is a power of considerable importance when you are keeping

in view the well-being of the estate as a whole. If I let the applicants into possession it may be that they would not feel justified in continuing those payments on the same scale as heretofore.

Of the authorities cited *In re Wythes* (1); *In re Bagot's Settlement* (2); and *In re Newen* (3) were cases of equitable tenants for life with only the legal estate standing between their claim to possession and the trustees. In the case of *In re Richardson* (4), unlike this case, the trustees had no power to lease, but the tenant for life had. *In re Money Kyrle's Settlement* (5) was a case where everything pointed to the advisability, convenience, and benefit generally to the estate of the tenant for life being let into possession. The tenant for life was applying to be let into possession of a small part of the settled estates, he being the legal tenant for life in full possession and enjoyment of the rest of the settled estates. *In re Wilkinson* (6) was a very different and, compared with this, a very simple case. The only question there was whether the applicants or the trustees should be allowed to collect fixed ground rents. In exercising judicial discretion a judge must have regard to the facts of each particular case. In this case I am not only not satisfied that letting the applicants into possession will be the most beneficial way of dealing with the settled land, but, in view of the extensive powers conferred by the will on the trustees, and the fact that they have since the testator's death managed the estate with conspicuous success, the impression on my mind is rather the reverse. I therefore refuse the application, but without prejudice to its being renewed at any time after the trusts of the term of one thousand years have come to an end. When that happens the applicants' claim will be entitled to consideration from a different point of view.

The summons also asks for a declaration that the applicants, persons having the powers of a tenant for life, have power under s. 2, sub-s. 22, of the Settled Land Act, 1882, to direct

(1) [1893] 2 Ch. 369.
(2) [1894] 1 Ch. 177.
(3) [1894] 2 Ch. 297.
(4) [1900] 2 Ch. 778.
(5) [1900] 2 Ch. 839.
(6) 85 L. T. 43.

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the investment or application of capital moneys accruing in respect of the said estate, and in the hands of the trustees for the time being for the purposes of the Settled Land Acts, in discharging encumbrances on the said estate (including encumbrances existing at the date of the death of the testator). I am not disposed to make a declaration in such wide and general terms, for it might be said that I had determined that the trustees were bound to comply with every direction of the tenant for life as to applying the proceeds of sale in discharge of encumbrances existing at the testator's death. The result would be that if the tenants for life sold enough of the Lancashire estates to realize 300,000*l.*, the trustees would be obliged to apply that sum in discharging encumbrances existing at the death of the testator, so that, subject to the question of recoupment, the trusts of the thousand years' term would come to an end at once. I am not prepared to sanction that at once without knowing more about it. I propose to declare that, notwithstanding the term of a thousand years, the applicants are entitled to exercise the powers conferred upon a tenant for life by the Settled Land Act, 1882, including the power to give a direction under s. 22, sub-s. 2. I am next asked to declare that the trustees are not bound to keep the encumbrances existing at the death of the testator, which have been paid off out of capital, alive for the benefit of the remaindermen entitled to the Lancashire estates. The testator has directed that the encumbrances on the Lancashire estates at the time of his death shall be paid off out of the Lancashire rents and profits. The trustees, under their power of sale in the will, or it may be the tenant for life, under the Settled Land Acts, from time to time sell part of the Lancashire estate, and the proceeds are applied to discharging the encumbrances which the testator, under the thousand year term, directed to be paid off out of the rents and profits of that estate. Are the trustees bound, or ought they when such an event occurs, to keep alive the encumbrances which have been paid off, so that if ever the occasion arises corpus may be recouped out of income

the amount so expended out of corpus? The point may never arise, because if the trusts of the thousand years' term are still in existence at the time when the corpus interests ripen into interests in possession, no question of recoupment can ever arise. I am unable to make the full declaration asked for here for this reason. Although my personal opinion is that, upon the true construction of the testator's will, in the event of the trustees selling under the power of sale and applying the capital in paying off encumbrances, there would be no right to recoupment, and although my personal opinion is that if there were a direction given by the tenant for life, a proper direction, to apply the proceeds of sale under the Settled Land Acts in the same way, there would still be no right of recoupment, yet I am faced by an order made by Stirling J. on December 4, 1895, with regard to this identical will. At that date the Countess was alive, and the order contains a declaration how, after the expiration of the estate limited during the life of the Countess, the Lancashire rents and profits during the continuance of the thousand years' term ought to be applied. [His Lordship read the order.] That order in terms directs the recoupment out of the rents and profits of the Lancashire estates of any corpus of a shire estate which has been applied in paying off a mortgage on that estate, and in terms that order would apply to the case of Lancashire corpus paying off Lancashire encumbrances. I cannot help thinking that it was overlooked at the time that such a provision for recoupment would be bad. It would involve accumulation beyond the period allowed by the Act, and it has been settled by *Tewart* v. *Lawson* (1) and *In re Heathcote* (2) that a provision for recoupment is not a provision for the payment of debts within s. 2 of the Thellusson Act, which permits accumulation beyond the period of twenty-one years. I am unable to treat the order of Stirling J. as if it had been wrongly made. It is true that the order in my opinion imputes to the testator a provision in his will which, if it had been there, would have been invalid; but as long as the order remains undischarged

(1) L. R. 18 Eq. 490. (2) [1904] 1 Ch. 826.

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it is a binding order upon those persons who were parties to it.

When the trustees in the past have paid off a Lancashire mortgage out of Lancashire purchase money they have taken a transfer of the mortgage debt and security to special trustees, that is to say, the mortgage has not been extinguished. The trustees kept it alive, because they felt bound to do so under the order of Stirling J., which directs the trustees: "upon paying off or discharging any such encumbrances as aforesaid otherwise than out of . . . . the said rents and profits of the said Lancashire estate to do such acts and things as may be necessary for the purpose of keeping such encumbrance on foot for the benefit of the shire estate thereby affected." In my opinion all that the trustees need do, and all they are required to do, is to keep records in their accounts of the encumbrances affecting the Lancashire estate which have in fact been paid off out of the corpus of the Lancashire estate. Accordingly I propose to declare that for the purpose of complying with the order of December 4, 1895, the trustees need not take any transfer to special trustees of mortgages paid off otherwise than out of rents and profits of the Lancashire estate, but need only keep records in their accounts of the encumbrances so paid off, but that so long as the order remains undischarged the trustees are bound to keep such records for the purposes of recoupment referred to in such order.

Solicitors: *Bower & Co.; Smith, Fawdon & Low, for Wright, Woodrow & Ayson, Leicester; Maples, Teesdale & Co.; Peake, Bird, Collins & Co.*

J. B. B. M.

EVANS *v.* HORNER.

[1924. E. 890.]

RUSSELL J.

1924 Nov. 20.

Emergency Legislation—Mortgage—Proposed Sale by Mortgagee—"Interest more than twenty-one days in arrear"—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 7.

Sect. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, suspends the rights of the mortgagee during one continuous period, which lasts as long as the conditions of the section are complied with. When those conditions are broken a subsequent compliance with them does not revive the protection given by the section.

THIS was an originating summons which asked for an account of what was due to the plaintiff under a mortgage of July 7, 1905, and to have the security enforced by foreclosure or sale. The mortgage was for 600*l.*, with interest at 4 per cent. payable half yearly on May 19 and November 19. Interest was due on May 19, 1924, and was not paid. More than twenty-one days later—namely, on June 11—this summons was issued and served on the defendant on the next day. On June 14, 1924, the defendant sent a cheque for the interest, which was accepted by the plaintiff on account generally.

By s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920: "It shall not be lawful for any mortgagee under a mortgage to which this Act applies, so long as—(*a*) interest at the rate permitted under this Act is paid and is not more than twenty-one days in arrear; and (*b*) the covenants by the mortgagor (other than the covenant for the repayment of the principal money secured) are performed and observed; and (*c*) the mortgagor keeps the property in a proper state of repair and pays all interest and instalments of principal recoverable under any prior encumbrance—to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured."

Baden Fuller for the plaintiff, the mortgagee. Sect. 7 restricts the rights of the mortgagee so long as the mortgagor complies with the conditions (*a*), (*b*) and (*c*). One condition is that interest is paid, and is paid not later than twenty-one

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days from the date it is due. Here that condition was not complied with and therefore the restriction on the mortgagee's rights was removed, and having once begun to enforce his security, there is nothing in the Act to prevent him proceeding. The Act takes away no rights, but merely suspends a particular form of remedy: *Welby* v. *Parker*. (1) The restriction is not reimposed by a subsequent compliance once the conditions have been broken: *Woodifield* v. *Bond*. (2)

R. Peel for the mortgagor. The plaintiff is not entitled to proceed with the summons. It is not correct to say that once the restriction has been removed it remains removed. The Act intervenes at every step in the proceedings: *Welby* v. *Parker* (1); and as the interest was paid before the hearing of this summons the plaintiff cannot proceed with it.

RUSSELL J. The question is what is the true construction of s. 7 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In my opinion the section only suspends the rights of the mortgagee during one continuous period, which lasts so long as conditions (*a*), (*b*) and (*c*) are complied with, and that when once those conditions are broken a subsequent compliance with them does not revive the protection given by the section.

The defendant argued that one must look to the point of time when any step is taken and see if then the conditions have been complied with: and that if at that point of time the conditions have been complied with, then the plaintiff cannot go on. I am unable to take that view. Sect. 7 (*a*) means that so long as interest is paid not later than twenty-one days after it is due, the mortgagee cannot call in his mortgage or take any steps for exercising any right of foreclosure or sale. The defendant has not observed that condition, and the plaintiff is entitled to judgment. There will be the ordinary order for an account in a foreclosure action.

Solicitors: *Withers & Co.; Cree & Son, for Pye-Smith & Barker, Sheffield.*

(1) [1916] 2 Ch. 1. (2) [1922] 2 Ch. 40, 52.

J. B. B. M.

RUSSELL J.
1924
Nov. 26; *Dec.* 4.

In re WHITE.

KNIGHT *v.* BRIGGS.

[1924. W. 1685.]

Will—Disposition by Reference to existing Document—Identification—Admissible Evidence.

By his will, dated November 29, 1922, the testator directed his trustees to hold three-twentieths of his residue upon trust for his sister. By a codicil, which was in form a direction to prepare a codicil, the testator instructed his solicitor to "settle bequest to sister as in a former will but so as to give her a protected life interest equivalent to what is known as an alimentary provision according to Scotch law." The codicil was admitted to probate. The solicitor had in his possession only one will of the testator, dated October 29, 1920, in which the sister's share was settled:—

Held, that the instructions given were final and complete, as was shown by the testator executing them as a testamentary disposition; that there was only one will by reference to which the instructions to prepare a codicil could be carried out—namely, the will dated October 29, 1920, which had been identified as the "former will" by properly admissible evidence; and the effect of the codicil was that the three-twentieths of the residue given to the sister were settled upon the trusts declared of her bequest in the "former will," and on her death devolved upon the trusts declared in that will.

Adjourned Summons.

By his will dated November 29, 1922, the testator directed three-twentieths of his residuary estate to be held on trust for his sister, Mrs. Briggs. A codicil dated January 23, 1924, was admitted to probate. The testator died on January 27, 1924. The codicil was in the following terms: "Instructions for codicil to the will of Robert Cecil White. Settle bequest to sister Mrs. Briggs as in a former will, but so as to give her only a protected life interest equivalent to what is known as an alimentary provision according to Scotch law." The circumstances in which it came into existence and in which it was signed and witnessed by the testator's solicitor, Mr. Knight, and his doctor were detailed in Mr. Knight's affidavit as follows: "On January 23, 1924, I received a message from the said testator's medical attendant, Dr. Miller, that the said testator was very ill and wished to

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see me. I accordingly went to the said testator's place of residence and saw him in bed. The said testator was so ill that he could only speak with great difficulty, and had to be held by Dr. Miller and revived with restoratives during the few moments in which I was conversing with him. I cannot say that the language of the said codicil represents the exact words used by the testator. The said codicil is in my handwriting, and was hurriedly written down by me in the said testator's presence. I wrote down the said codicil after inquiring of the testator what he desired me to do. The said codicil is in the form of instructions, and was written by me with a view to the preparation of a more formal codicil. At the time when I wrote down the said codicil I fully anticipated that the said testator would recover from his said illness, as I knew he had recovered from other illnesses of a similar nature, and I had previously been told by Dr. Miller that he expected the said testator to recover. When I wrote down the said codicil I had a recollection that one, and one only, of the two wills which I had prepared for the said testator prior to the said will of November 29, 1922, contained provisions under which the property thereby given to Mrs. Briggs was settled, and that the said two wills were in the possession of my firm, but I could not remember the precise terms, or the precise date, of the prior will in question. I asked the said testator to sign the said codicil in case he should die before I had an opportunity of putting the same into a proper shape by referring to the said testator's previous testamentary dispositions which I had not with me at the time. Before the said codicil was signed by the said testator I read it through to him, and the said codicil was witnessed by the said testator's doctor and myself." The testator died before the formal codicil could be prepared and executed.

The will which contained provisions under which the property given to Mrs. Briggs was settled was a will dated October 29, 1920.

By cl. 4 of that will the testator settled 3000*l.* upon Mrs. Briggs, which on her death were to "fall into and form part of my residuary estate and go accordingly." By

cl. 5 of the said will the trusts declared of the residuary estate were for the benefit of the testator's brother, Arthur Silva White, his wife and children.

Under the will admitted to probate Henry S. White, Arthur Silva White, and Mrs. Briggs each took three-twentieths of the residue, Dr. Price took two-twentieths, Herbert S. White, G. F. White, W. B. White and Margaret Heaps took one-twentieth, and Algernon Silva White five-twentieths. The three-twentieths given Arthur Silva White were settled on exactly similar trusts, in favour of him, his wife and children, to those declared by the will of October 29, 1920, concerning the residuary estates under that will.

The summons asked who were the persons beneficially interested in the three-twentieths of the residue given to Mrs. Briggs by the will of November 29, 1922.

J. V. Nesbitt for the plaintiffs, the trustees.

Rawlence for Mrs. Briggs. An alimentary provision according to Scotch law is void in English law. The codicil therefore is void: *In re Fitzgerald.* (1) The reference to "a former will" is so vague that it is incapable of being applied to any particular will, and therefore parol evidence is not admissible to explain it: *Allen* v. *Maddock* (2); *University College of North Wales* v. *Taylor.* (3) The rule of law is that an instrument properly attested, in order to incorporate another instrument not attested, must describe it, so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake: *Smart* v. *Prujean* (4); *University College of North Wales* v. *Taylor.* (5)

Mr. Knight had in his possession two wills of the testator, only one of which settled the share of Mrs. Briggs, but it is impossible to say that there were not other testamentary documents in the custody of other solicitors, to which the testator might have intended to refer.

(1) [1903] 1 Ch. 933.
(2) (1858) 11 Moo. P. C. 427, 454.
(3) [1908] P. 140, 145.
(4) (1801) 6 Ves. 560, 565.
(5) [1908] P. 140, 144.

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Morton for Mrs. Arthur Silva White and her children. The codicil was an instruction to Mr. Knight to settle Mrs. Briggs' share, as in a former will, and the instruction was complete. There was only one will by which Mr. Knight could obey his instructions—namely, that of October 29, 1920, in which the bequest to Mrs. Briggs was settled. The codicil refers to an existing document, so as to leave no doubt that the document referred to is the one propounded, and therefore parol evidence is admissible to identify it: *Allen* v. *Maddock* (1); *University College of North Wales* v. *Taylor*. (2)

The latter case was reversed on appeal, but on the ground that the reference was not to an existing document.

The result is that the codicil incorporates clauses 4 and 5 of the will of October 29, 1920, and the three-twentieths given to Mrs. Briggs by the will of November 29, 1922, are settled upon the trusts declared of her bequest in cl. 4, and on her death devolve upon the trusts declared in cl. 5, for the benefit of Arthur Silva White, his wife and children.

Beebee for Arthur Silva White adopted *Morton's* argument.

Cecil Turner for Herbert Silva White. The codicil cuts Mrs. Briggs' share down to a life interest, but goes no further. That is the result of the use of the word "only." Mrs. Briggs is to have only a protected life interest.

Fawell for Dr. Price, a residuary legatee under the last will. This is a trust by reference to the will of October 29, 1920. "The only safe course to adopt is to re-write the words declaring such trust, merely substituting the second fund or property for the first": *Trew* v. *Perpetual Trustee Co.* (3); *In re Campbell's Trusts* (4) Therefore here you substitute the three-twentieths of the residue for the bequest given to Mrs. Briggs in cl. 4 of the 1920 will. Clause 5 being a bequest of residue, and not a bequest to Mrs. Briggs, is not material. The codicil in the last will, when rewritten, will read that after the death of Mrs. Briggs the three-twentieths of residue is "to fall into and form part of my residuary

(1) 11 Moo. P. C. 427, 444.
(2) [1907] P. 228, 235.
(3) [1895] A. C. 264, 267.
(4) [1922] 1 Ch. 551, 560.

estate and go accordingly." The result is that the three-twentieths is distributable among the residuary legatees under the last will: *In re Palmer.* (1) If cl. 5 of the earlier will were read into the codicil, there would be a gift of two residues, and that cannot have been the intention of the testator.

Cur. adv. vult.

Dec. 4. RUSSELL J. The first question to consider is the construction of the document signed on January 23, 1924. It does not in terms purport to make a disposition of property. In terms it only purports to be instructions to some one to prepare a document containing a disposition of property in accordance with those instructions. But it must be construed as an instrument disposing of property. How? In my opinion it must be construed as a direction by the testator that the property bequeathed by the will to Mrs. Briggs was to go and be enjoyed as it would have gone and been enjoyed if he had executed a codicil prepared in pursuance of the instructions then given to settle it as in a former will. That is a disposition by reference, which purports to incorporate another document, and a document obviously already in existence—namely, a former will. If that document is capable of being identified, evidence is admissible for the purpose of identification, and if the document is identified the disposition is defined and complete.

It is at this point that the main difficulty arises. It is said that the words "a former will" would equally apply to any former will of the testator which contained a settlement of a bequest to Mrs. Briggs, that there might be several former wills each containing different trusts for such a settled bequest, and that it is impossible to say how many former wills, in addition to those actually known to have existed, had been executed by the testator. Indeed, it is truly said and the evidence shows that the testator had made divers testamentary dispositions with the assistance of divers legal advisers in different parts of the globe. Nevertheless, if the

(1) [1893] 3 Ch. 369.

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document, which is called "a former will," can be identified, all uncertainty disappears.

Can it be identified? In my opinion it can. The bequest is to go as if the testator had executed a codicil prepared in pursuance of the instructions then given. I am entitled to know to whom the instructions were given, and the answer is, Mr. Knight. Therefore the bequest is to go as if the testator had executed a codicil prepared by Mr. Knight in pursuance of the instructions then given to Mr. Knight. I am next entitled to know whether there was a document in existence properly described as "a former will" by reference to which Mr. Knight, acting on those instructions, could prepare a codicil to carry out those instructions. The answer on the evidence is, yes. There was such a document—namely, a will of October 29, 1920—containing a settled bequest in favour of Mrs. Briggs and others, which had been prepared by and was then in the custody of Mr. Knight.

I am next entitled to know whether there was any other document in existence, properly described as "a former will," by reference to which Mr. Knight (acting on those instructions) could prepare a codicil to carry out those instructions. The answer on the evidence is, no. There was only one such document—namely, the will of October 29, 1920. Before Mr. Knight could have prepared a codicil to carry out his instructions by reference to any other former will, if any such existed, he would have required fresh or additional instructions. That the instructions given were final and complete is shown by the fact that the testator executed them as a testamentary disposition.

In these circumstances the document "a former will" is not only capable of identification, but in my opinion has been identified by properly admissible evidence. Had there been more than one former will containing a settled bequest to Mrs. Briggs by reference to which Mr. Knight could without further instructions have prepared the codicil, the position no doubt would have been different; but the circumstances properly proved to exist in the present case leave no doubt in my mind as to the instrument referred to by the testator.

To quote the language of the Privy Council in *Allen* v. *Maddock* (1): "The result of the authorities both before and since the late Act, appears to be, that when there is a reference in a duly-executed testamentary instrument to another testamentary instrument by such terms as to make it capable of identification, it is necessarily a subject for parol evidence, and that when the parol evidence sufficiently proves that, in the existing circumstances, there is no doubt as to the instrument, it is no objection to it that, by possibility, circumstances might have existed in which the instrument referred to could not have been identified."

It was said that the decision of the Court of Appeal, in *University College of North Wales* v. *Taylor* (2), was an authority that no evidence was admissible in the present case to identify the document. I do not agree. All that was decided in that case was that in order to admit evidence to identify a document referred to in a will, the reference must be to an existing document, and that evidence is not admissible if the will on construction may refer to a future document.

The result down to this point is that I hold that the words "a former will" mean the will of October 29, 1920. No difficulty arises by reason of the reference to an alimentary provision according to Scotch law, which it was said was void in English law. Those words are used by the testator as merely descriptive of a protected life interest. Another way of reaching the same result would be to construe the codicil upon the footing that the instructions to Mr. Knight are for him to settle the bequest as he (Mr. Knight) had settled it in a former will of the testator. If this be a reasonable construction, and in my opinion it is, the former will is clearly identifiable and identified by the admissible evidence.

A further question next arises. By the will of October 29, 1920, cl. 4, the testator bequeathed to his trustees a sum of 3000*l.* for the benefit of Mrs. Briggs during her life for her separate use without power of anticipation unless and until certain events should happen. After the determination of her life interest during her life there was during the remainder

(1) 11 Moo. P. C. 427, 461. (2) [1908] P. 140.

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of her life a discretionary trust in favour of various persons (including Mrs. Briggs), the income so far as not applied under the discretionary trust to be held upon such trusts as would be applicable thereto if Mrs. Briggs were dead. After her death the 3000*l.* was to "fall into and form part of my residuary estate and go accordingly." The trusts declared of the residuary estate by cl. 5 were for the benefit of the testator's brother, Arthur Silva White, his wife and children.

It was argued that the effect of the codicil of January 23, 1924, was to dispose of Mrs. Briggs' three-twentieths after her death upon the trusts of the testator's residuary estate, as declared by his last will, and not upon the trusts declared of residue under the will of October 29, 1920. The result of this would be, it was said, that upon the death of Mrs. Briggs her three-twentieths would devolve in seventeenths upon the residuary legatees, other than Mrs. Briggs, in the proportions mentioned, Arthur Silva White's share being settled in the same way as his original three-twentieths. I cannot accede to this contention. In my opinion what the testator has said is that Mrs. Briggs' three-twentieths are to be settled upon the trusts declared of her bequest in the former will, that is to say, that upon her death they are to devolve upon the trusts declared in cl. 5 of the will of October 29, 1920.

In the result I declare that upon the true construction of the will and codicil the three-twentieths share of residue by the will directed to be held upon trust for Mrs. Briggs, ought to be held by the plaintiffs during the lifetime of Mrs. Briggs upon the same trusts and subject to the same powers and provisions as are declared and contained by and in cl. 4 of the will of October 29, 1920, of and concerning the sum of 3000*l.* therein mentioned, and after her death upon the same trusts and subject to the same powers and provisions as are declared and contained by and in cl. 5 of the same will of and concerning the property therein described as "my residuary estate." The costs of all parties will be taxed and paid out of the testator's residuary estate.

Solicitors: *Sole, Sawbridge & Co.; Cutler & Allingham.*

J. B. B. M.

SEDDON *v.* COMMERCIAL SALT COMPANY, LIMITED.

C. A. 1924 *Nov.* 10.

[1924. S. 1365.]

Practice—Discovery—Action for Forfeiture of Lease—Affidavit of Documents.

By an underlease certain lands and works were demised to the first defendants for the term of twenty-one years less one day. The underlease contained a covenant by these defendants that they would not assign, transfer or part with possession of the demised premises or any part thereof without the consent of the underlessor, and that in case of the breach of such covenant it should be lawful for the underlessor to re-enter upon the demised premises, and that thereupon the demise should absolutely determine. The plaintiff, who was the purchaser of the reversion on the underlease, brought an action to recover possession of the premises. By his statement of claim he alleged that the first defendants, in breach of their covenant, had transferred, underlet or parted with the possession of the premises to the second defendants, and/or the third defendants. By their respective defences the defendants traversed the allegations in the statement of claim. On a summons taken out by the plaintiff asking that the second defendants might be ordered to file a full and sufficient affidavit of documents, Russell J., considering himself bound by the decision of Sargant J. in *Earl of Powis* v. *Negus* [1923] 1 Ch. 186 made the order asked for. On appeal:—

Held, that there was one issue only between the plaintiff and the three defendants—namely, whether the underlease, subject to which the plaintiff as he alleged derived his title to the possession of the land in question, was still subsisting or had been determined by the exercise by the plaintiff of his right of re-entry; that that being so, the well-established rule that the Court would not assist a forfeiture by ordering discovery of documents applied, and therefore that the order made against the second defendants must be discharged.

Earl of Mexborough v. *Whitwood Urban Council* [1897] 2 Q. B. 111 followed.

Earl of Powis v. *Negus* [1923] 1 Ch. 186 overruled.

Decision of Russell J. reversed.

Appeal from the decision of Russell J.

By an indenture of lease dated July 15, 1913, Sir D. L. Broughton demised to A. F. Calvert certain lands and works called Lawton Salt Works situate at Odd Rode in the county of Chester for the term of twenty-one years from June 24, 1913.

By an indenture of underlease dated August 6, 1913,

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Calvert demised to the first-named defendants, the Commercial Salt Co., Ld., the Lawton Salt Works, together with certain plant works buildings fixtures and articles thereon and thereunto belonging, for the term of twenty-one years from June 24, 1913, less one day. The first-named defendants entered into various covenants, including in particular a covenant that they would not at any time during the continuance of the demise "assign transfer underlet or part with the possession of the said demised premises or any part thereof without the previous consent in writing of the lessor, but so that such consent shall not be unreasonably or arbitrarily withheld." The indenture further provided that in the event of any breach of any of the covenants and agreements on the part of the first-named defendants therein contained then and in any such case it should be lawful for the lessor at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon the demise should absolutely determine, but without prejudice to any other right or remedy of the lessor in respect of any breach of the first-named defendants' covenants therein contained.

By an indenture of mortgage dated November 5, 1920, lands and premises in question were demised by Calvert to Coutts & Co. for the residue of the term of years created by the lease of July 15, 1913, except the last three days thereof, and Calvert declared himself a trustee of such three days to assign or dispose thereof as Coutts & Co. should direct and thereby further irrevocably appointed Coutts & Co. in his name and on his behalf at any time to assign the said three days.

By an indenture dated May 10, 1922, Coutts & Co. in pursuance of their powers contained in such last mentioned indenture assigned to the plaintiff, H. Seddon, the term created thereby, and further for and on behalf of Calvert assigned to the plaintiff the residue of the term created by the lease of July 15, 1913.

On March 28, 1924, the plaintiff issued his writ in the present action against the three defendants, the Commercial Salt

Co., Ld., Palmer, Mann & Co., and Palmer, Mann & Co., Ld., claiming (1.) possession of the premises; (2.) damages; and (3.) mesne profits.

By his statement of claim the plaintiff alleged that in March, 1922, the first-named defendants in breach of the covenant in the underlease of August 6, 1913, without the previous consent of the lessor and without applying therefor transferred and/or underlet and/or parted with the possession of the said premises or a part thereof to the defendant firm and/or the defendants Palmer, Mann & Co., Ld.

In his particulars the plaintiff alleged that the first-named defendants so transferred and/or underlet and/or parted with possession of the same by and/or under and by virtue of an agreement in writing dated March 8 or alternatively March 28, 1922, and made between the first-named defendants and John Alexander Palmer, John Mann and Charles Douglas Palmer, being the partners, or partners in the defendant firm; that in or about the month of March, 1922, possession was in fact given to or taken by the defendant firm and/or the defendants Palmer, Mann & Co., Ld., and that since the month of March, 1922, the defendant firm and/or the defendants Palmer, Mann & Co., Ld., had been and still were in possession of the premises or a part thereof.

The defendants the Commercial Salt Co., Ld., by their defence alleged that they were in possession of the lands and works in question; that they had never transferred or underlet or parted with possession of the lands and works or any of them or any part thereof to the defendant firm or the defendants Palmer, Mann & Co., Ld., or any other person firm or company as alleged in the statement of claim or at all; that no notice was given to them under s. 14, sub-s. 6, of the Conveyancing Act, 1881, before the commencement of this action, and that the action was not maintainable.

The defendants Palmer, Mann & Co. and Palmer, Mann & Co., Ld., by their joint defence traversed the allegations in the statement of claim. They admitted that Palmer, Mann & Co., Ld., were the holders of debentures of the defendants the Commercial Salt Co., Ld., for securing principal sums

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amounting to 21,900*l.* which contained a floating charge on the undertaking of the last-named company and that they had therefore an interest as equitable chargees in the lands and works called Lawton Salt Works in the statement of claim referred to, but they did not admit that the defendants the Commercial Salt Co., Ld., had ever transferred underlet or parted with possession of the lands and works or any part thereof to them or either of them. They alleged that defendants the Commercial Salt Co., Ld., were and had been at all material times in possession of the whole of the lands and works.

On May 28, 1924, the plaintiff took out a summons in the action asking that the defendants Palmer, Mann & Co. might be ordered to file a full and sufficient affidavit of documents within ten days. The summons was adjourned into Court and was heard by Russell J. on October 17, 1924, who, considering himself bound by the decision of Sargant J. in *Earl of Powis* v. *Negus* (1) made the order asked for against Palmer, Mann & Co., but gave leave to appeal.

The defendants, Palmer, Mann & Co. appealed. The appeal was heard on November 10, 1924.

W. A. Greene K.C. and *C. W. Turner* for the appellants. The action is brought by the respondents to enforce the forfeiture of the underlease, and, therefore, no order for discovery can be made. The only issue in the action is whether or not there has been a forfeiture. It is suggested that the action so far as it affects the appellants Palmer, Mann & Co. is not an action for forfeiture. But the object of the action is to destroy the underlease and derivative interests under it, and the Court will not assist such an action by making an order for discovery. The rule that in an action to enforce a forfeiture of a lease for breach of covenant the Court will not grant discovery of documents for the purpose of proving the forfeiture is very ancient and well established: *Smith* v. *Read* (2); *Harrison* v. *Southcote* (3);

(1) [1923] 1 Ch. 186. (2) (1737) 1 Atk. 526, 527.
(3) (1751) 1 Atk. 527, 538.

Chauncey v. *Tahourden* (1); *Boteler* v. *Allington* (2); *Pye* v. *Butterfield* (3); *Martin* v. *Treacher* (4); *Earl of Mexborough* v. *Whitwood Urban Council.* (5) If the pleadings in this case are looked at it will be seen that the sole issue is whether or not there has been a forfeiture. The decision of Sargant J. in *Earl of Powis* v. *Negus* (6) is distinguishable from the present case on its facts.

[POLLOCK M.R. That case does not appear in any way to impair the doctrine laid down in *Earl of Mexborough* v. *Whitwood Urban Council.* (5)]

The present case is one for forfeiture of a headlease and with it the derivative interests and for nothing else, and the order ought therefore not to have been made.

C. A. Bennett K.C. and *H. M. Giveen* for the respondents. The question here is as to the width of the rule laid down in *Earl of Mexborough* v. *Whitwood Urban Council.* (7) As against the appellants Palmer, Mann & Co. the question is whether they are in possession of the premises.

[POLLOCK M.R. The position of the various defendants is not differentiated by the plaintiff in his statement of claim.]

The respondents are claiming that the appellants Palmer, Mann & Co. are wrongfully in possession, because the defendants the Commercial Salt Co. have committed a breach of the covenant in their lease. The only issue against the respondents is whether they are in possession. The rule in *Earl of Mexborough* v. *Whitwood Urban Council* (7) does not apply in such a case. All the respondents desire to ascertain is whether the plea of the defendants the Commercial Salt Co., that they are in possession is true. *Earl of Powis* v. *Negus* (8) is this case.

[POLLOCK M.R. For my part I am not going to narrow the rule.]

Here the issue is not against the persons whose estate is sought to be forfeited but against the persons alleged to be

(1) (1742) 2 Atk. 392.
(2) (1746) 3 Atk. 452, 457.
(3) (1864) 5 B. & S. 829, 837.
(4) (1886) 16 Q. B. D. 507, 510.
(5) [1897] 2 Q. B. 111, 114, 119.
(6) [1923] 1 Ch. 186, 190.
(7) [1897] 2 Q. B. 111.
(8) [1923] 1 Ch. 186.

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in possession. The rule as to discovery is entirely confined to forfeiture.

W. A. Greene K.C. was not called upon to reply.

POLLOCK M.R. This is an appeal from a decision of Russell J. of October 17 of this year ordering discovery as against the defendants who appeal.

The case is, to my mind, of the simplest kind. The plaintiff sues as assignee of the reversion on an underlease dated August 6, 1913, which contained a covenant that the lessees would not assign, transfer, underlet or part with possession of the demised premises or any part thereof without the previous consent in writing of the lessor. That underlease prima facie runs for twenty-one years from June 24, 1913, less one day — that is, until 1934. The plaintiff as the assignee of the reversion claims now to be entitled to re-enter upon the premises, and he claims possession of the premises and damages and mesne profits against all these three defendants, the Commercial Salt Co., Palmer, Mann & Co., and Palmer, Mann & Co., Ld. He does not differentiate at all the nature of his claim against any of them; he seeks to recover possession of the premises. So long as that underlease is outstanding he, as assignee of the reversion, does not appear to have upon his statement of claim any claim or right to possession of the premises, but he says that as a matter of fact there has been a forfeiture of that underlease because there has been a transfer or underlease or parting with possession of the premises without the permission and consent of the lessor, and in his particulars he says that the transfer, underletting and parting with possession is the letting into possession of the second defendants, or alternatively, the third defendants. It appears to me quite clear that the plaintiff's claim therefore is that in consequence of the breach of the covenant contained in the underlease there has been a forfeiture which has given him the right to possession as against all these three defendants. That being so, it appears that his claim, not only as against the first but also as against the second and third defendants is for a forfeiture.

The rule as to discovery is clearly laid down in the recent case of the *Earl of Mexborough* v. *Whitwood Urban Council* (1), where Lord Esher M.R., summarizing a well known rule, obtaining both at common law as well as in equity, said: "Where in any action an issue is raised solely for the purpose of obtaining judgment for a forfeiture of land, the Court will not with regard to that issue make any order either for the discovery of documents or for the administration of interrogatories. There may be an action where that is one of the issues and there are other independent issues, and the Court may with regard to those other issues make an order for discovery of documents and interrogatories, but on the issue relating to forfeiture I think the Court will not make such an order. When, as in the present case, the sole issue raised is whether there has been a forfeiture, I think no order can be made in favour of the plaintiff either for discovery of documents or for the administration of interrogatories"; in other words, it will not assist by granting an order for discovery. The antiquity of that rule has been brought to our notice by Mr. Greene, who has called our attention to the fact that in the days of Lord Hardwicke it was pointed out in *Smith* v. *Read* (2) that the rule applies not only to cases in which a man must suffer if he makes the discovery, but also to cases where he may be subject to a penalty, or to a forfeiture, and the width of the rule, I think, is well laid down in the judgments which appear in the *Earl of Mexborough's* case. (1) I do not wish to repeat them, because they are set set out at large there.

In the present case Russell J. followed *Earl of Powis* v. *Negus* (3), a case in which Sargant J. (as he then was) allowed a subpœna duces tecum. But Sargant J. held that the rule laid down in the *Earl of Mexborough's* case (1) was a good and binding rule, and he did not purport in any way to question it at all. All that happened in that particular case was that from the pleadings and issues there raised he did not hold that there was a forfeiture or penalties involved in the

(1) [1897] 2 Q. B. 111, 117. (2) 1 Atk. 526.
(3) [1923] 1 Ch. 186.

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particular issue, and he found himself able to make an order for a subpœna duces tecum. The case cannot be used as in any way impinging upon or cutting down or altering or varying the rule laid down in the *Earl of Mexborough's* case. (1) All that we have to consider here, therefore, is whether or not in the present case there is a claim for forfeiture which falls within the rule laid down in the *Earl of Mexborough's* case. (1)

For the reasons which I have given I think the present case clearly falls within that rule, and therefore that *Earl of Powis* v. *Negus* (2) does not apply, and that no order for discovery ought to be made in accordance with the rule. Therefore Russell J.'s order must be discharged and the appeal allowed with costs.

WARRINGTON L.J. I am of the same opinion. There is a very well known rule that where in any action an issue is raised solely for the purpose of obtaining judgment for the forfeiture of land, the Court will not with regard to that issue make any order either for the discovery of documents or for the administration of interrogatories. In the present case Russell J. has made an order for discovery of documents against one of three defendants to an action for possession of land, and the question is whether in making that order Russell J. was departing from the rule to which I have referred.

In making the order as he did the learned judge purported to follow as binding him a decision of Sargant J., as he then was, in *Earl of Powis* v. *Negus*. (2)

In my opinion in this case there is one issue and one issue only as between the plaintiff and all the defendants, and that is whether the underlease, subject to which the plaintiff himself alleges that he takes his title to possession of the land, is still existing or has been determined by the exercise by the plaintiff of his right to re-enter. As regards the first defendants, the Commercial Salt Co., of course the issue is direct; there is no question about that being an issue of

(1) [1897] 2 Q. B. 111. (2) [1923] 1 Ch. 186.

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forfeiture or no forfeiture. It is exactly the same with regard to the other defendants, because the plaintiff alleges that the other defendants are in possession under an act of the first defendants, the underlessees, which give rise to his right to determine the underlease; therefore it is as much a claim to forfeiture against these defendants as it is against the original underlessees. It seems to me, as I have said already, that there is one issue and one issue only as between the plaintiff and all the defendants: is the plaintiff entitled to re-enter and determine the underlease? I think, so far as the view I have expressed is concerned, it is impossible for the decision in *Earl of Powis v. Negus* (1) to stand with the decision in the present case, and with all respect to Sargant J., I confess to some difficulty in understanding how he arrived in that case at the conclusion at which he did that there was no claim for forfeiture against the defendants, who were then in possession. Referring to the defendants' defence he says, and I think his judgment depends upon this: "It appears to me to be a mere denial of the allegation that they are in possession." With all respect to the learned judge, I do not understand that. In that case, as in the present, the possession of these defendants, as alleged by the plaintiff, was under an act of the lessee, resulting in conferring upon the plaintiff the right to determine the lease, and it seems to me in that case as in this the claim with all respect was really against those defendants for forfeiture as much as it was against the original lessee. In my opinion the order of Russell J., founded on *Earl of Powis* v. *Negus* (2), was wrong and must be discharged.

SCRUTTON L.J. This is an appeal against an order made by Russell J. in an action for possession. His order is against the respondents, and orders them to discover documents. The objection made to it is that the claim is one for forfeiture, and that in an action for forfeiture the Court does not grant discovery to help the person claiming forfeiture, and Russell J., without expressing an opinion of his own, has treated himself

(1) [1923] 1 Ch. 186, 192. (2) [1923] 1 Ch. 186.

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as bound by a decision of Sargant J., as he then was, allowing an order for discovery in such a case.

The common law abhors penalties and leans against forfeitures. We are bound by the decision of this Court in *Earl of Mexborough* v. *Whitwood Urban Council* (1) to the effect that in an action for forfeiture and breach of covenant the Court will not grant discovery, and I personally do not find it necessary to go through the cases cited to us by Mr. Greene to convince us that the order of the Court of Appeal was right.

That being the rule, one looks at this action to see what it was, and I find that the plaintiff alleges himself to be an assignee of a reversion of a term expiring in 1934, and he claims possession. So far he puts himself out of Court, because he shows that he has no immediate right to possession of the premises that he is claiming. He therefore goes on to complete his case by alleging that the underlease on which his reversion is expectant contained a covenant against assigning without the consent of the landlord and a power of re-entry if that covenant were broken. He then alleges that of the three defendants against whom he is bringing the action one has assigned in breach of that covenant, and the other two have entered under the agreement and are in possession. That claim appears to me one which can only be effective if it involves forfeiture of the term on which this reversion is expectant for breach of a covenant, together with forfeiture of any derivative rights obtained from that assignment; and it would appear, therefore, unless there is some reason to the contrary, clearly to come within the rule that the Courts which lean against forfeitures will not grant procedure to assist the person claiming forfeiture and will therefore not grant discovery to assist that claim.

When I look at the decision of Sargant J. in *Earl of Powis* v. *Negus* (2), which Russell J. followed, I find the last two lines of the headnote are : " Because the two defendant companies did not claim to be in possession by virtue of any derivative title under the lease, so that the action against them was not

(1) [1897] 2 Q. B. 111. (2) [1923] 1 Ch. 186.

for forfeiture." That particular line of argument I am unable to follow. I do not see how it alters what the claim is, which appears on the statement of claim, to say what sort of defences the defendants raised to it. The claim remains what it is on the claim: "I claim that I had a right to possession in 1934 which has become a right to possession in 1924 because the holder of the term has broken the covenant upon which he holds the term, and I have issued a writ which is equivalent to re-entry, and therefore the term is now mine and the right of the defendants is forfeited." That really constitutes the whole of my criticism of the judgment of Sargant J., because the headnote is founded upon his phrase that the defendants expressly deny something, and therefore it appears to him that the action against them is not one for forfeiture at all. The nature of the action against them is determined by the statement of claim, and the statement of claim appears to me to be obviously based upon a forfeiture of the term which the claim alleges.

For these reasons I agree with my learned brother Warrington; I do not think the decision in *Earl of Powis* v. *Negus* (1) can stand. In my opinion that case was wrongly decided, and therefore this order, which was based upon it, must also go and the appeal must be allowed.

Appeal allowed.

Solicitors for appellants: *Fraser & Williams.*
Solicitors for respondent: *Bulcraig & Davis.*

(1) [1923] 1 Ch. 186.

W. I. C.

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Jan. 21.

In re GIBBS AND HOULDER BROTHERS AND COMPANY, LIMITED'S, LEASE.

HOULDER BROTHERS AND COMPANY, LIMITED *v.* GIBBS.

Applied. LEE *v.* K. CARTER LD. [1940] 1 K. B. 85

[1924. H. 3294.]

Landlord and Tenant—Lease—Provision against Assignment without Licence—Licence not to be withheld unreasonably—Proposed Assignment—Assignee a yearly Tenant of adjoining Premises belonging to Lessor—Consent withheld because adjoining Premises might become vacant.

In a lease for years the lessees covenanted not to assign the premises, or any part thereof, without the consent in writing of the lessor, such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation. The lessees agreed to assign the premises, subject to the consent of the lessor, to R., Ld., who were in possession of adjoining premises on a yearly tenancy from the same lessor. The lessor refused to give his consent to the assignment on the ground that he would lose good tenants of the adjoining premises, and would have great difficulty in re-letting them :—

Held, that the licence had been unreasonably withheld, and that the lessees were free to assign.

Grounds of objection unconnected with the person of the assignee or the user or occupation of the premises are not reasonable. Dicta tending to the contrary not followed.

By an indenture of lease dated September 29, 1908, the defendant demised to the plaintiffs, premises known as the White Building, Market Street, Sheffield, for a term of twenty-one years from September 29, 1908, and the plaintiffs thereby covenanted that they would not during such term, without the consent of the defendant first obtained, assign, sub-let, or part with the possession of the demised premises or any part thereof, "such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation." Early in June, 1924, the plaintiffs agreed to assign the premises to Roneo, Ld., for the residue of the term, subject to the consent of the defendant. Roneo, Ld., were yearly tenants from the defendant of 12 Market Street, adjoining the premises the subject of the lease. By a letter dated June 18, 1924, addressed to the plaintiffs' manager, the defendant expressed his unwillingness to consent to the proposed assignment on the ground that

such assignment would result in Roneo, Ld., determining their tenancy of 12 Market Street. On August 30 the defendant wrote a letter to the solicitor of Roneo, Ld., in which he stated that he had not the slightest objection to Roneo, Ld., on the ground of respectability and responsibility. On September 2 the defendant again wrote to the same solicitor, and said: "My sole reason for withholding my consent is on the reasonable ground that by the assignment I should lose Roneo, Ld., as good tenants of No. 12, and because I shall have great difficulty in finding any tenant for No. 12." The plaintiffs considered that the defendant's reason for withholding his consent to the assignment was unreasonable, and they took out this summons asking for a declaration: (1.) That on the true construction of the lease, and in the events which had happened, the refusal of the defendant to grant a licence to the plaintiffs to assign the lease to Roneo, Ld., was unreasonable; and (2.) that notwithstanding such refusal the plaintiffs, without any licence from the defendant, were entitled to assign the lease to Roneo, Ld.

Stamp for the plaintiffs. The defendant's consent to the assignment has been unreasonably withheld. The covenant does not mean that he may withhold his consent when it is convenient to him. The object of the covenant is only to enable him to protect his property. Here he is withholding his consent, not to protect this property, the subject of the lease, but to retain a tenant for another property. That is outside the object of the covenant. This case clearly comes within *In re Winfrey and Chatterton's Agreement* (1) and *Bates* v. *Donaldson.* (2) In both those cases the lessor refused to give a licence to assign, because he desired to obtain possession of the premises, and that was held not to be a sufficient reason for the refusal. Here the reason for the refusal is not the occupation of these premises by Roneo, Ld., but the non-occupation by Roneo, Ld., of other premises. A lessor can withhold his consent, if he has reasonable ground

(1) [1921] 2 Ch. 7. (2) [1896] 2 Q. B. 241.

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for objecting to the assignee. Here the defendant expressly states that he has no objection of any kind to Roneo, Ld.

Gavin Simonds K.C. and *R. F. Roxburgh* for the defendant. There is nothing in the authorities which decides the point at issue in this case, but in none of them is there a limitation put on the meaning of the word "unreasonably." The defendant has not acted unreasonably in withholding his consent to the assignment. A lessor may refuse his consent for any reason that affects his interest, however extrinsic that reason may be to the user of the premises or the personality of the assignee. If a lessor finds that the assignment may be in any way detrimental to his interest he is entitled to refuse his consent. In *Treloar* v. *Bigge* (1), the lessor, knowing that the premises were to be acquired by a public authority, and believing that it would not be to his interest to allow them to pass into the possession of a new tenant, refused his consent to the tenant underletting part of the premises. The lessor was held to have acted reasonably, although there was no question of the user of the premises or the personality of the underlessee. In *Barrow* v. *Isaacs & Son* (2), where the lessees underlet part of the premises without the consent of the lessor, it was held that the lessor was entitled to recover possession of the premises. The words there were "arbitrarily withheld," and Kay L.J. said (3) that those words simply meant that the consent must be asked for before the assignment, and that it might be withheld, even though the intended lessees were proper persons, if such withholding was not arbitrary. In *Governors of Bridewell Hospital* v. *Fawkner* (4) Kekewich J. said that the lessors had to consider not merely the tenant of any particular premises forming part of their estate, but the well-being of the whole estate. There is no distinction between that case and the present case in relation to this particular clause. It was said by Lawrence J. in *Mills* v. *Cannon Brewery Co.* (5), where the refusal was held to be

(1) (1874) L. R. 9 Ex. 151.
(2) [1891] 1 Q. B. 417.
(3) [1891] 1 Q. B. 424.
(4) (1892) 8 Times L. R. 637.
(5) [1920] 2 Ch. 38, 46.

unreasonable, that the question he had to decide was not whether the grounds of refusal did or did not commend themselves to his mind as reasonable, but whether in refusing the licence the defendant company acted as a reasonable man might have done in the circumstances, or whether, on the contrary, it acted wholly unreasonably. Here the defendant was only doing what any reasonable man would do to protect his own interest.

[*Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation* (1) was also cited.]

Stamp in reply.

TOMLIN J. The facts of the case are not in dispute, and the question which I have to determine is one of construction upon the lease—namely, whether on the admitted facts and having regard to the reason given for the refusal of consent to the assignment, that refusal was, within the meaning of the lease, unreasonably withheld.

Where a lease contains a provision of this kind under which a consent is not to be withheld unreasonably, "unreasonably" must be a word having a meaning with reference to some particular conditions, and the withholding must be unreasonable in reference to some particular considerations. The real question on such a clause is this: What are the considerations which the Court is entitled to regard in determining whether or not a particular reason for refusal is justified within the meaning of the clause?

It is said by Mr. Simonds on behalf of the lessor that a clause such as this must be read in such a way that, for the purpose of determining reason or unreason, the Court is entitled to have regard to all the circumstances which may affect the interest of the lessor, however extrinsic they may be to the fact of the lease, or the user of the premises in the lease, or the personality of the lessee or assignee; in other words, that wherever a lessor finds that an assignment to a particular individual may result in something which will be detrimental to him wholly without regard to the character of the assignee,

(1) (1891) 63 L. T. 834.

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or the user which the assignee may make of the premises, the lessor may assert that as a reason for refusing his assent. On the other hand it is said: No, the considerations with reference to which reason or unreason is tested must necessarily be much narrower than that; they must be reasons which have some relation to, and arise in some way out of, the personality of the lessee or the proposed user or occupation of the premises, and the mere fact that some indirect detriment may follow to the lessor by reason of the assignment does not of itself afford the lessor a ground for refusing his assent to the assignment.

A great number of cases have been cited to me, and I think this emerges from the cases, that there has never been actually a case where the precise point has been determined, that is to say, none where the facts of the case themselves directly raise the precise point. On the other hand, the learned judges who have decided those cases have not always confined themselves to dealing exclusively with the matters in hand, and they have, as is no doubt natural and proper, embarked on statements of the principles which they held to justify them in arriving at the particular conclusion adopted in the particular case, and it has been a matter of doubt whether those principles are so stated as to make it plain beyond question whether the considerations, by reference to which the question of reason or unreason is to be determined, are to be taken on the narrower or on the wider plane.

The first case to which my attention was called was *Treloar* v. *Bigge* (1), where the covenant was somewhat different in terms, because the phrase there employed was: "But such consent is not to be arbitrarily withheld." There are expressions of opinion in later cases which suggest that there is no distinction between the phrase "arbitrarily" and the phrase "unreasonably," and in *Treloar* v. *Bigge* Kelly C.B. says (2): "It cannot be said that under such circumstances the refusal was arbitrary; that is, unfair and unreasonable. It might certainly be to the advantage of the defendant, and indirectly it would benefit the plaintiff too, who would, by reason of

(1) L. R. 9 Ex. 151. (2) L. R. 9 Ex. 151, 156.

the non-assignment, receive compensation for his interest in the term." The point in that case was that there was known to be pending a claim to take possession of the premises by a public authority, and it was thought that the willingness of the then lessees to leave the premises would render it more easy to get vacant possession, which would be an advantage when the premises were taken by the public authority, than it would be if they were assigned to a new tenant who wanted to keep the premises. That seems rather to suggest that provided the Court can find that what the lessor has in mind, in withholding his consent, is that in some way or other he will be injured or lose his advantage if he gives his assent, the Court may accept that as a ground for withholding it.

The next case is *Barrow* v. *Isaacs & Son.* (1) There again the phrase was: "Should not be arbitrarily withheld," and I think that the judgment of Kay L.J. may be relevant where he says (2): "If the intended lessees are respectable and responsible persons the consent is not to be 'arbitrarily withheld.' Those words simply mean that the consent must be asked for before the assignment, and that it may be withheld, even though the intended lessees are proper persons, if such withholding is not arbitrary. Many cases may be supposed in which it would not be. Respectable and responsible persons might desire to carry on a trade which would be injurious to the plaintiff, or which would depreciate the property. The plaintiff might have valid reasons for objecting to an underlease of a portion only of the warehouse. The underlessees might wish to use it for some purpose not being a trade, which would altogether change the character of the premises, and many other reasons for objecting might be suggested." There again it seems to me it is plain he was contemplating the possibility of injury to the lessor, but he does not go beyond some injury which would arise by reason of the user or occupation of the property.

Then my attention has been called to the case before Kekewich J. of *Governors of Bridewell Hospital* v. *Fawkner* (3),

(1) [1891] 1 Q. B. 417. (2) [1891] 1 Q. B. 423–4.
(3) 8 Times L. R. 637.

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where there was a question of this kind. The Governors of Bridewell Hospital, being the owners of considerable property, refused their consent to an assignment of certain premises which the lessees were proposing to assign to General Booth of the Salvation Army, on the ground that the use of the premises for the purpose of the Salvation Army might deteriorate the other property held by the Corporation, although General Booth stated that he required the premises for offices only, and not for meetings or band playing. Kekewich J. said that with regard to the covenant "One meaning was where the reason given was capricious, uncertain or unreasonable"—the word here again was "arbitrarily"—"Here the consent had not been unreasonably withheld in the sense that no reason had been given; but there were also these words 'without good and sufficient reason'; and his Lordship was asked to consider, not whether there was an absence of reason, but whether the reason given was good and sufficient. Here was a body of gentlemen holding a considerable estate in the City of London, and they had to consider not merely the tenant of any particular premises forming part of that estate, or the rent he had to pay, or the covenants into which he had to enter, but the well-being of the whole estate. It might be that one property was intended to be held for a purpose which, however excellent in itself, might deteriorate the other properties. Here they were advised by persons competent to judge that it was not desirable to let this particular property to Mr. Booth, and affidavits to that effect had been filed by Mr. Baggallay and Sir J. Whittaker Ellis. It might turn out that those gentlemen were wrong, and that the result of letting the premises to Mr. Booth would be to benefit the neighbourhood. But his Lordship thought the plaintiffs had shown a good and sufficient reason for withholding their consent. Mr. Marten had urged that the objection raised was a sentimental one, but the question was one of law, not of sentiment, and on the point of law the decision must be in favour of the plaintiffs." As I understand it that really means this, that it is a good reason for a lessor to withhold his consent if he

can show that there is something in the proposed occupation of the premises demised which will detrimentally affect other property of his, the lessor, in other words, the injury would not be to him qua lessor, but the occasion of the injury to him must arise by reason of some consideration connected with the individuality of the lessee or the user or occupation of the demised premises. That seems to me to be the effect of it.

The next case is *Bates* v. *Donaldson* (1), and the relevancy of that case mainly is this, that it contains a judgment by A. L. Smith L.J. where he states a principle and the question is, what is the precise ambit of the principle which he states? The lease there contained a covenant not to assign without licence, such licence not to be unreasonably withheld in the case of any respectable and responsible person who may be the proposed assignee. The lessor withheld the licence to assign because he desired to obtain possession of the premises, and it was held that he could not do so. In the Court of Appeal Kay L.J. says this (2): "Counsel admitted, and I agree, that if the proposed assignee intended to use the house for some purpose to which the landlord might reasonably object, though such purpose was not forbidden by the lease, nor by any rule of law, the landlord might reasonably refuse to permit the assignment. So I should think there might be other reasons, personal rather to the landlord than the tenant, which might justify his refusal under the terms of this covenant." Those words were relied upon by Mr. Simonds as supporting to some extent his contention that the considerations by which the Court measures the reason or unreason are wider than is urged by those on the other side. I think it would be unwise to draw any such inference from that single sentence. It obviously is not necessary to pronounce upon that for the purposes of this particular case. The other reasons, personal rather to the landlord than to the tenant, may well be reasons which in fact consist in apparent injury to the lessor not qua lessor, but as an individual, without excluding the limitation that they must

(1) [1896] 2 Q. B. 241. (2) [1896] 2 Q. B. 244.

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arise from causes directly connected with the personality of the lessee or the user or occupation of the premises. However, A. L. Smith L.J. in his judgment says this (1): "Now, when the lessor granted the lease he parted with his interest in the premises for the entire term. The tenant during that term can assign to any respectable and responsible assignee—in which case the lessor is bound not to unreasonably withhold his permission. It is not, in my opinion, the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term." Then he proceeds to a statement of what, I think, was intended to be a statement of principle, the application of which leads him to the conclusion at which he has arrived: "It was in my judgment inserted alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises, which was the reason why in the present case the assent was withheld." It will be observed that that taken as a statement of principle is quite consistent with the reason for refusal being a good reason, if it is based upon injury to the lessor, not qua lessor, but as an individual, provided it is the apparent result, or necessary result, of something connected with the character of the tenant or the user or occupation of the premises.

The next case cited was *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation* (2) before Romer J. Some considerable reliance was placed on this case by Mr. Gavin Simonds, because he urged upon me that in fact this case goes further in his favour than any other case cited, and is really a decision that the lessor may rely on some reason founded merely on a private apprehension of detriment not directly connected with the character of the assignee or the user or occupation of the premises. This was a case where the lessees were lessees of land with an iron furnace

(1) [1896] 2 Q. B. 247. (2) 63 L. T. 834, 836, 837.

and mill and water rights over the River Duddon, and the lease contained a covenant not to assign or underlet without the consent of the lessors, but such consent was not to be "unreasonably refused, or refused to a person of responsibility and respectability." There was no covenant in the lease to work the furnace, and in June, 1889, the lessees made an agreement with the Corporation of Barrow-in-Furness to assign to them the residue of the term, and they did it upon certain special conditions under which the assignors bound themselves to withdraw their opposition in Parliament to a Bill which the Corporation were promoting in relation to water rights, and the Corporation on their part bound themselves not to use the water rights which were contained in the lease in connection with the manufacture of iron. In those circumstances the lessors refused their assent to the lease on the ground that the Corporation were not taking the lease for the purposes for which it was granted, and might have objects prejudicial to the lessors. The question which the learned judge had to determine was whether the refusal was reasonable, and he came to a conclusion on two points. He first held that the Corporation was not a person of responsibility and respectability, that is to say, was not a person at all within the meaning of the covenant, and then he went on to hold that the reason was a good reason, that is to say, that it was not unreasonable within the meaning of the clause. He stated all the facts, including the fact that the Corporation would be in a better position to get rid of the lessors' opposition to the Bill, and he then says: "Obviously the Corporation could not actively use their position as lessees, and work these iron works, or use these water rights, the water rights being used for the purpose of the other demised premises, and they could not be utilized by the Corporation for the benefit of the Borough." Then, having dealt with the question as to the meaning of the word "person," he says: "I think that lessors in the position of these gentlemen were clearly entitled to look at the circumstances to which I have alluded, and say that the Corporation could not be a good tenant, or a good assignee." It seems to me that what

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the learned judge has done is to state the whole history of the case, and he gives the reason why the Corporation entered into the agreement, including why they should place themselves in the position of strangers as regards the lessor in opposition to the Bill, and he says that the Corporation having entered into the agreement, the chances of the furnaces being worked disappears for good and all, and that that is injurious to the lessors or may be injurious to the lessors, and they are entitled to say that this assignee taking over the lease on these conditions is not a suitable assignee, and that the user of the premises is not such a user as they are bound to assent to. Therefore I come to the conclusion that no comfort can be obtained from that case for those who desire to widen the considerations by which the reason is measured.

The only other case I need refer to is the recent case of *In re Winfrey and Chatterton's Agreement* (1), where "A tenancy agreement of a house to the plaintiff contained a provision that the tenant was not to assign, underlet, or part with the possession of the house without the consent of the landlord, which consent was 'not to be unreasonably withheld in the case of a respectable and responsible person.' The defendant purchased the reversion, thus becoming the landlord, intending to occupy the house herself, and she alleged a bargain with the plaintiff for the purchase of the house, but the plaintiff denied that the matter had gone beyond negotiation. The plaintiff assigned her interest to a respectable and responsible person, but the defendant refused to consent to the assignment :—Held, that the refusal was unreasonable, and that the plaintiff was entitled to assign without licence." Sargant J. referred to *Bates* v. *Donaldson* (2) and he also cited the passage which I have read from the judgment of A. L. Smith L.J., and then he makes this comment upon it (3) : "That is forcible language and applies almost precisely to the present case, and the only difference between the case before A. L. Smith L.J.

(1) [1921] 2 Ch. 7. (2) [1896] 2 Q. B. 241.
(3) [1921] 2 Ch. 10.

and this case is that here the defendant alleges that there was a definite bargain for the purchase of the term." That means that the language employed by the Lord Justice was language which, in the view of the learned judge, stated what the principle was on which this clause falls to be decided.

The question is what I am to make of all that. I come to the conclusion that the principle as stated—and I hope I am not disrespectful in putting it this way—by A. L. Smith L.J. in *Bates* v. *Donaldson* (1) is accurately stated, and when he said what he did say, he meant what he said, and that it is by reference to the personality of the lessee or the nature of the user or occupation of the premises, that the Court has to judge of the reasonableness of the lessor's refusal. It is quite true that the injury threatened or apprehended to the lessor may be in respect of something which has nothing to do with the lease of the demised premises; it may be in relation to other property of which he is the owner, but the danger must come from the nature of the user or occupation or from the personality of the assignee. In the present case what is the real reason of the refusal? The real reason is not one which had anything to do with the personality of the lessee, or with the user or occupation of the premises; the real reason is that the lessor wants to prevent the assignee from giving up other premises of which he is also lessor; in other words, his real purpose in refusing an assignment is not in relation to the demised premises at all, but in relation to other property, and to bring pressure to bear on the assignee not to give up a tenancy of different premises belonging to him.

In my view, therefore, the necessary conclusion is that the refusal in this case was unreasonable, and that being so the lessee is free to assign.

Solicitors for plaintiffs: *Ashurst, Morris, Crisp & Co.*

Solicitors for defendant: *Bell, Brodrick & Gray, for Rodgers & Co., Sheffield.*

(1) [1896] 2 Q. B. 241.

P. J. B.

Applied. *Re* PEROWNE (*decd.*). [1951] 2 All E.R. 201.

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In re COMBE.

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[1924. C. 2227.]

Will — Power of Appointment — Special Power — No Gift in Default of Appointment—Implication.

There is no inflexible rule that, if a testator confers a power to appoint among a class but makes no gift over in default of appointment, the Court will imply a gift to the class in equal shares if the power be not exercised. It is only when upon the construction of the will the testator shows an intention to create a trust in favour of the class that this implication will be made.

By his will a testator devised and bequeathed his residuary real and personal estate to trustees upon trust for conversion and to hold the net proceeds and the investments representing the same In trust to pay the income to his wife during widowhood and after her death or remarriage In trust for his only son for life and from and after his death "In trust for such person or persons as my said son . . . . shall by will appoint but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." There was no gift over in default of appointment:—

Held, that the Court would not imply a gift in default of appointment to the objects of the power, as the will did not show any intention on the part of the testator to create a trust in favour of the objects of the power; and, therefore, that if the son released his power of appointment the property would go subject to the two life interests as on an intestacy.

In re Weekes' Settlement [1897] 1 Ch. 289 applied.

In re Hughes [1921] 2 Ch. 208 explained.

ADJOURNED SUMMONS.

By his will dated May 12, 1923, Harvey T. Brabazon Combe, after appointing his wife and his son to be his executors and trustees, devised and bequeathed all his property, both real and personal, to his trustees upon trust for sale and conversion and out of the proceeds of sale and his ready money to pay his funeral and testamentary expenses and debts. The testator then directed his trustees to stand possessed of the residue of his estate and the investments for the time being representing the same In trust to pay the income thereof to his wife during her widowhood and after her death or remarriage In trust for his son Harvey Alexander Brabazon Combe for

his life and from and after his death "In trust for such person or persons as my said son . . . . shall by will appoint but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." The testator then gave his trustees power to postpone sale and conversion, powers of management and a wide power of investment; but the will contained no gift over in default of appointment.

This summons was taken out by the son to have it ascertained whether upon his releasing the power of appointment contained in the will there would be a partial intestacy with the result that he as heir at law and his mother and himself as next of kin would take the whole of the testator's property subject to the life interests given by the will to his mother and himself in succession.

The summons also asked, if there was no such partial intestacy, to have it ascertained who were the relations of the whole blood.

The testator died on December 18, 1923, leaving the widow and one son only, the plaintiff, surviving. The son had one daughter, an infant. The testator had no brother and one sister only.

J. F. Carr for the testator's grandchild. The testator clearly shows an intention to benefit a class and the Court will imply a gift to them in default of appointment: *Burrough* v. *Philcox* (1) and see Farwell on Powers, 3rd ed., pp. 528, 529. It is there suggested that *In re Weekes' Settlement* (2) is of doubtful authority, but that has been dealt with by Romer J. in *In re Llewellyn's Settlement.* (3) It is submitted that in this will there was sufficient to show that the testator intended to benefit relations of the whole blood. Therefore in the absence of an appointment amongst them the property will go to all these relations in equal shares. When there is a power to appoint amongst a class, that in itself shows an intention to benefit the class: *Lambert* v.

(1) (1840) 5 My. & Cr. 73. (2) [1897] 1 Ch. 289.
(3) [1921] 2 Ch. 281.

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Thwaites. (1) Here the testator showed that he expected the power to be exercised.

Shebbeare for a trustee.

C. W. Turner for the testator's sister. The result of the will is to create a trust for such persons, relations of the whole blood, as the testator's son should appoint and therefore the Court would imply a gift to them in default of appointment: *Brown* v. *Higgs* (2); *In re Caplin's Will.* (3) Both these cases were discussed in *In re Weekes' Settlement.* (4) This case is not covered by *In re Weekes' Settlement* (4), as there was here an intention by the testator to benefit his blood relations. This is not a mere power of appointment but a trust which, if necessary, the Court would execute: compare *In re Brierley* (5) and *In re Llewellyn's Settlement.* (6)

Further, the decision in *In re Weekes' Settlement* (4) is wrong. There is an inflexible rule that when property is given to a person for life and after his death to such defined objects as he shall appoint and there is no express gift over to these objects in default of appointment, such a gift will be implied: Jarman on Wills, 6th ed., p. 650; Hawkins on Wills, 2nd ed., p. 77; Farwell on Powers, 3rd ed., p. 528. The same view was taken by Sargant J. in *In re Hughes* (7); see also 25 Harvard Law Review, p. 12, where Professor Gray takes the view that a gift in default of the exercise of a power of appointment should always be implied, except where on the face of it the power to appoint amounts to a mere permission to give to certain objects. That it takes very little to lead the Court to imply a gift to the objects of the power is shown by *Forbes* v. *Ball* (8) and *In re White's Trusts.* (9)

Sir Arthur Underhill for the plaintiff. To ascertain whether or not a gift in default of appointment ought to be implied, the Court must construe the actual words used and ascertain from them the testator's intention. It will only imply a gift where there is a clear intention to confer a benefit upon

(1) (1866) L. R. 2 Eq. 151, 155.
(2) (1799) 4 Ves. 708; (1803) 8 Ves. 561.
(3) (1865) 2 Dr. & Sm. 527.
(4) [1897] 1 Ch. 289.
(5) (1894) 43 W. R. 36.
(6) [1921] 2 Ch. 281.
(7) [1921] 2 Ch. 208, 214.
(8) (1817) 3 Mer. 437.
(9) (1860) Joh. 656.

the objects of the power. Thus the Court would readily imply a gift in default of appointment to children of the marriage in a marriage settlement. Here, however, there is really no definite class in favour of whom the power is to be exercised. It is in terms a general power followed by a limitation on its exercise in favour of "relations of the whole blood."

It is difficult to understand what is meant by this expression. In Stroud's Judicial Dictionary, Tit. "Whole," persons of the whole blood are defined as persons having a common couple of ancestors; and, if so, it would be possible to roam widely over the world for possible objects of the power. It is a class which the testator does not know or pretend to know, how then can the Court imply an intention on the part of the testator to benefit it? The case closely resembles in this respect *In re Eddowes*. (1)

J. F. Carr in reply on the question of the alleged difficulty of ascertaining the class. Even if the class were difficult to ascertain it would be no ground for refusing to find an implied trust. But it is suggested that relations of the whole blood means blood relations and nothing more, and must be limited to the next of kin of the testator as at the death of his son. In the alternative, relations of the whole blood are those who can claim a descent through both parents of the testator.

TOMLIN J. The testator in this case died in December of 1923, and by his will, after appointing executors and trustees, one of whom was his wife, he gave all his property, both real and personal, to trustees for sale and conversion and, after payment of his funeral and testamentary expenses and debts, to stand possessed of the residue of his estate and the investments for the time being representing the same in trust to pay the income to his wife during her widowhood and from and after her death or remarriage "In trust for my son Harvey Alexander Brabazon Combe for his life and from and after his death in trust for such persons or person as my said

(1) (1861) 1 Dr. & Sm. 395.

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son . . . . shall by will appoint, but I direct that such appointment must be confined to any relation or relations of mine of the whole blood." And the will stopped there so far as regards any disposition of the residue. The testator left him surviving his widow, who is the first defendant in these proceedings, the son who is the plaintiff, a daughter of that son, who is the second defendant, and he left no other issue. There is also living a sister of the testator. I understand that for all practical purposes, that constitutes the family.

The question I am asked to determine is whether, in the event of the son releasing his power of appointment, there will be after his death an intestacy in relation to the property so that as a result of that release the widow and the son between them will be absolutely entitled to the entirety of the estate. This question raises a point upon which there is a certain divergence of opinion in the authorities cited. In the third edition of Farwell on Powers the following rule is stated at p. 528, and this rule, no doubt, is taken from the earlier editions: "If there is a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment the Court implies a gift to those objects equally, if the power be not exercised." The rule is stated very much in the same words in Hawkins on Wills, 2nd ed., p. 77.

There are a considerable number of reported cases in which it has been held from time to time that where there is no express disposition in default of appointment under a power to appoint among a class, either a gift is implied to the class equally in default of appointment or the appointment is construed as a gift to the class in the manner the appointee selects, so that the power of selection is in the nature of a trust imposed upon him, and that, failing the selection, the members of the class take equally. One of the earliest cases of that class is *Brown* v. *Higgs* (1), where Lord Eldon said that it was one of the most difficult and doubtful cases that had ever occurred. That case has had a number of successors, many of which were examined and reviewed by Romer L.J.

(1) 8 Ves. 561.

(Romer J. as he then was) in *In re Weekes' Settlement.* (1) In that case, the will of the testatrix, which was under consideration, conferred on her husband a life interest in certain property, and there followed these words: "and I give to him power to dispose of all such property by will amongst our children in accordance with the power granted to him as regards the other property which I have under my marriage settlements." Romer J. began by saying: "Now apart from the authorities, I should gather from the terms of the will that it was a mere power that was conferred on the husband, and not one coupled with a trust that he was bound to exercise. I see no words in the will to justify me in holding that the testatrix intended that the children should take if her husband did not execute the power. This is not a case of a gift to the children with power to the husband to select, or to such of the children as the husband should select by exercising the power." Then he says: "Am I then bound by the authorities to hold otherwise? I think I am not. The authorities do not show, in my opinion, that there is a hard and fast rule that a gift to A. for life with a power to A. to appoint among a class and nothing more must, if there is no gift over in the will, be held a gift by implication to the class in default of the power being exercised. In my opinion the cases show (though there may be found here and there certain remarks of a few learned judges which, if not interpretated by the facts of the particular case before them, might seem to have a more extended operation) that you must find in the will an indication that the testatrix did intend the class or some of the class to take—intended in fact that the power should be regarded in the nature of a trust—only a power of selection being given, as, for example, a gift to A. for life with a gift over to such of a class as A. shall appoint." The learned judge then proceeds to examine the authorities, including *Brown* v. *Higgs* (2); *Burrough* v. *Philcox* (3) and a number of others. In the course of this examination he called attention to certain statements of a general character which, he says,

(1) [1897] 1 Ch. 289, 290, 292, 297.
(2) 8 Ves. 561.
(3) 5 My. & Cr. 73.

TOMLIN J. must be read by reference to the facts of the particular case. For instance, he refers to *In re White's Trusts* (1), and commenting on the general statement made by Wood V.-C., says it was too large unless checked by reference to the case before him. Then he states his conclusion upon the examination of those cases in this way: "I have now shown that none of the cases relied on by the applicants establish the general proposition; and I hold that in this case there was no gift by implication to the children of Emily Mary Slade in default of appointment by her husband."

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The matter then stands really in this way. Am I to approach this will governed by an inflexible and artificial rule of construction to the effect that where I find a power of appointment to a class not followed by any gift in default of appointment, I am bound to imply a gift to that class in default of the exercise of the power? Or ought I to approach this will for the purpose of construction in the same spirit as I approach any other will and endeavour to construe it and arrive at the testator's meaning by examining the words expressly used, only implying those things which are necessarily and reasonably to be implied? It seems to me that if I am to read the rule as stated in Farwell on Powers, 3rd ed., p. 528, as alone governing my mental attitude in approaching this will, then I have no option but to imply a gift, because here is a power of appointment which has not been exercised and there is no express gift in terms to the class in default of the exercise. On the other hand I think the judgment of Romer J. in *In re Weekes' Settlement* (2) indicates that my proper course is to adopt the other line.

It is said that in a recent case before Sargant J. what I may call the arbitrary rule was again laid down. That case is *In re Hughes.* (3) There "a testator appointed H. H. his executor and trustee, and gave him all his estate 'Upon trust for all my children and their issue in such shares and in such manner as I shall by codicil direct or appoint, or,

(1) Joh. 656. (2) [1897] 1 Ch. 289.
(3) [1921] 2 Ch. 208, 213.

failing any such direction or appointment by me, then in such shares as . . . . the said H. H. shall in his discretion think fit and proper.' " The testator also made a codicil, and it was " Held, (1.) that the children and their issue living at the death of the testator were entitled to the estate, subject to the power of selection given to H. H.; and (2.) that the power so given to him was not confined to directing in what shares members of the class were to take." Now if I may say so with respect, it seems to me plain that that is a case upon which, taking as a guide the principle enunciated by Romer J., there could only be one conclusion. There was in fact a gift " for all my children and their issue " subject to the power of selection in the executor, and so far as that will was concerned, it was not necessary to assert the existence of any inflexible rule in order to arrive at this conclusion. It is true that in that case the learned judge referred to *Brown* v. *Higgs* (1), and he cited a passage from the judgment of Lord Eldon, in which he says: " It is perfectly clear that, where there is a mere power of disposing, and that power is not executed, the Court cannot execute it. It is equally clear, that, wherever a trust is created, and the execution of that trust fails by the death of the trustee, or by accident, the Court will execute the trust. . . . . But there are not only a mere trust and a mere power, but there is also known to the Court a power which the party, to whom it is given, is intrusted and required to execute; and with regard to that species of power the Court considers it as partaking so much of the nature and qualities of a trust, that if the person, who has that duty imposed on him, does not discharge it, the Court will, to a certain extent, discharge the duty in his room and place." Then Sargant J. goes on: " With regard to powers of this description the rule to be derived from *Brown* v. *Higgs* (1) and other similar cases is stated, and in my judgment concisely and accurately stated in Farwell on Powers, 3rd ed., p. 528, in the following language "—and then he reads the rule which I have already read. Now, it is quite plain that what the learned judge is doing there is this. He

(1) 8 Ves. 561, 570.

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is saying that that rule applies when once you have come to the conclusion that the power is not merely a power, but a trust which you are bound to execute; and therefore what the learned judge is saying there is not in any sense in conflict with what Romer J. had said—namely—that you must, in accordance with the ordinary principles of construction, first of all arrive at a conclusion whether the power is really a trust, and that, if you arrive at the conclusion that it is, then, as Sargant J. said in the case which I am now citing, the rule in Farwell on Powers applies. That seems to me to be wholly consistent from beginning to end, and I can see no justification for my departing from the rule which has been laid down by Romer J., and I do not find in what Sargant J. said anything inconsistent with it. I therefore propose, in construing this will, to govern myself by the principle which has been enunciated by Romer J.

On that footing, what am I to decide? Am I able, from this language, to say that in fact the testator has created for a certain class of persons a trust and that there was a duty on the son to execute that trust and that, if he failed to execute it, the Court would execute it, and hold that the members of the class took equally between them? The form of this power, whether it be called a power or a trust, follows the common form. The trustees are directed to hold the property after the death of the tenant for life "in trust for such person or persons as my said son . . . . shall by will appoint." There is nothing special about the form of that. It is just the ordinary language which the ordinary conveyancer would employ for the purpose of creating a power of appointment. Pausing there, the power is perfectly general. There is no class of any sort or kind, and if the will had ended there, it is quite plain that there would have been a general testamentary power, and on the failure to exercise that general testamentary power there would have been an intestacy. But the will proceeds, "but I direct that such appointment"—that is, any appointment made under the general power—"must be confined to any relation or relations of mine of the whole blood." That is to say, he first gives a general power and

then he says: But you must confine the exercise of that power to "any relation or relations of mine of the whole blood."

I have no difficulty in coming to the conclusion that there is in this will no indication adequate to enable me to conclude that a trust was intended to be created. The class said to be the beneficiaries here differs wholly from the class which is the subject of the discussion in the cases that were cited. That was generally the testator's children or, at any rate, a quite definite and ascertained class. What this class is going to be, if it became necessary to ascertain it, I confess at the moment I am unable to say. At any rate it does not seem to me to be such a class as justifies me in saying that the testator meant it to benefit in any event. I think it may very well be that the form of this will is deliberate and that he really meant his son to have a life interest and to be able to dispose of the property afterwards, provided that it was not left wholly out of the family, and that for the rest he was content to let it go as the law would make it go upon an intestacy. I see no reason on the words of this will for importing into it something which I am quite sure is not there. I shall therefore declare that upon the release of the power of appointment the property will go, subject to the life interests of the widow and the son, as upon an intestacy. That renders it unnecessary to explore the question of the class in favour of which the power of appointment is exercisable.

Solicitors: *Cohen & Cohen; Hempsons; Graham, Son & Drewry; King, Adams & Co.*

H. C. G.

C. A. 1924 Dec. 1.

BATCHELOR *v.* MURPHY.

[1923. B. 5338.]

Lease—Option to purchase Freehold—Agreement for transfer of Residue of Term to new Tenants—Release of Lessor—Surrender of Lease—Execution of new Lease "on the same terms and conditions in all respects" as original Lease—New Lease not granted—Acceptance of Rent by Lessor—Exercise of Option by new Tenants.

By a memorandum addressed to the executor of the lessor and signed by the original lessee and by the defendants, who desired to acquire the residue of the term, it was agreed that in consideration of the executor releasing the lessee and accepting the defendants as lessees for the residue of the term, the lease should be surrendered and a new lease executed by the defendants for the residue of the term "on the same terms and conditions in all respects" as the original lease. The original lease contained an option for the lessee his executors, administrators and assigns to purchase the freehold reversion. No new lease was ever executed by the defendants, who entered into possession from the date of the memorandum and paid rent to the executor for several years and, before the expiration of the term, duly exercised the option, their right to which the executor refused to recognize:—

Held (by Warrington and Sargant L.JJ.; Pollock M.R. dissenting), that in substance the effect of the memorandum was to transfer the benefit of the existing lease to the defendants, the lessee being released from liability, and to settle the terms of the new lease which was to be executed; that the "new lease" referred, not to the relation of landlord and tenant, but to the document which was to be executed and for which the original lease was to be the model, and which was to contain all the terms and conditions of that model including the option; and that the defendants were entitled to exercise the option.

Decision of Tomlin J. [1924] 2 Ch. 252 reversed.

APPEAL from a decision of Tomlin J. (1) upon an adjourned summons raising the question whether the appellants were entitled to exercise an option contained in a lease to purchase the freehold reversion of the demised premises, in the following circumstances:—

By a lease dated October 17, 1913, Mrs. Susannah Candler Batchelor (therein called "the lessor," which expression was defined as including her heirs and assigns) demised to Herbert William Clarkson (therein called "the lessee," which expression was defined as including his executors, administrators and assigns) certain premises at Bridlington for the

(1) [1924] 2 Ch. 252.

term of 10½ years from October 6, 1913, at the yearly rent therein mentioned.

The lease contained a covenant by the lessee against assigning, underletting or parting with the possession of the demised premises without the previous written consent of the lessor. It also contained an option for the lessee to purchase the freehold reversion of the demised premises at the price of 3000*l.* upon giving to the lessor during the term three calendar months' notice in writing; and a power for the lessor at any time during the term to give the lessee three calendar months' notice in writing to terminate the option to purchase if the lessee did not before the expiration of such three months give the lessor notice in writing exercising the option.

On May 22, 1915, the lessor died, having by her will dated July 11, 1913, appointed John Henry Sawden and the plaintiff her executors. The will was proved by J. H. Sawden on September 23, 1915, power being reserved to the plaintiff to prove.

In November, 1915, the lessee was desirous of transferring the residue of the term of his lease to Mr. and Mrs. Murphy, the defendants to the summons, and in order to carry this into effect J. H. Sawden prepared a memorandum, which was signed by the parties. It was as follows:—

"To John Henry Sawden, Executor of Susannah Candler Batchelor deceased.

"In consideration of you agreeing to release me the undersigned Herbert William Clarkson and accept us the undersigned Alfred Henry Murphy and Clementina Lucy Murphy as lessees for the unexpired residue of the term in the lease dated the 17th day of October 1913 and made between the said Susannah Candler Batchelor of the one part and Herbert William Clarkson of the other part relating to premises No. 17 Prince Street Bridlington we respectively agree as follows:

"The said Herbert William Clarkson to surrender the said lease.

"The said Alfred Henry Murphy and C. L. Murphy to

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execute a new lease for the unexpired term of eight years and six months from the sixth October last on the same terms and conditions in all respects as the lease of 17th October 1913 with the exception of the rent which until the cessation of the present hostilities shall be reduced to 82*l.* per year and during the remainder of the term at the rent reserved by the original lease. Dated the 17th day of November 1915.

"(Signed) H. W. Clarkson, Alfred Henry Murphy, Clem. L. Murphy."

The defendants then entered into possession of the premises and rent was paid by them to, and accepted by, J. H. Sawden, but no new lease was ever prepared or executed.

On September 13, 1916, J. H. Sawden died, and on January 13, 1917, probate of Mrs. Batchelor's will was granted to the plaintiff, to whom the defendants thereafter paid their rent.

On October 4, 1923, the defendants gave notice to the plaintiff exercising their option to purchase the freehold reversion, and thereupon the plaintiff took out the summons above-mentioned.

Tomlin J. held (1) on the construction of the memorandum, that it only provided for a new lease containing the same tenancy provisions as the original lease; and that as an option to purchase in a lease was not a term of the tenancy but a collateral bargain between the parties, the defendants had not acquired an option to purchase the freehold.

The defendants appealed. The appeal was heard on December 1, 1924.

Greene K.C. and *Horace Freeman* for the appellants. The object of the agreement was to put the parties in the same position as if there had been an assignment, except that Clarkson was to drop out and be released from liability. There is nothing in the suggestion that Sawden as executor could not give an option to purchase, because he was not imposing any greater burden on the estate than it was subject

(1) [1924] 2 Ch. 252.

to already. In *Sherwood* v. *Tucker* (1) the only parties concerned were the landlord and tenant, and this Court held that the indorsements on the lease referred to the tenancy relationship between those parties and not to something collateral. But in the present case a third party comes in and there is an agreement, not for a new relationship of landlord and tenant, but for the continuance of the existing tenancy under a lease exactly like that which Clarkson had. The appellants were to execute a new lease for the unexpired residue "on the same terms and conditions in all respects." The word "terms" has nothing to do with the term of the lease. It was to be a document in the same form in all respects as the existing document. Tomlin J.'s judgment proceeded on the footing that "terms and conditions" meant tenancy terms and nothing else. But I submit that the parties intended that the document in front of them should be repeated in all respects. An option may be collateral to the relationship of landlord and tenant, but it was not collateral to the document which was to be repeated.

[POLLOCK M.R. referred to *Swinburne* v. *Milburn* (2) and *Iggulden* v. *May* (3) on the question of repeating covenants for renewal.]

The whole basis of the decision in *Iggulden* v. *May* (3) was that the document intended in that case was to be a final document, and not one which by the inclusion of a covenant for renewal would lead to a succession of documents. In the present case "lease" refers to the document to be executed, and though the option may be independent of the relationship, it is not independent of the document.

Luxmoore K.C. and *Bischoff* for the respondent. This is a short question of construction. There was the old lease, and in it was an option to purchase which was purely collateral. It happened to come in the same document, but there was no reason why it should. What is the meaning of "lease"? I submit that it was used in order to create the relationship of landlord and tenant, and that the option

(1) [1924] 2 Ch. 42; 440. (2) (1884) 9 App. Cas. 844.
(3) (1806) 7 East, 237.

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was a thing quite collateral to that: *In re Leeds and Batley Breweries, Ld., and Bradbury's Lease* (1); *Sherwood* v. *Tucker*. (2) The option would have passed on an assignment, because there was no alteration between the parties and it was a contract contained in the lease. But if that lease or document is put an end to, then a different position arises, and in this case there was a surrender of the old lease. The lessor agreed to "accept" the appellants as lessees for the unexpired residue of the term; that means that there was to be the relationship of landlord and tenant. Clarkson agreed to put an end to the old lease and the appellants agreed to execute a new lease.

[WARRINGTON L.J. If a solicitor had been instructed to prepare the new lease, would he have been justified in omitting the option?]

It ought to be the subject either of express mention or necessary implication. Under the terms of this agreement the parties are going to put an end to the original option, and it is gone and does not come into the new lease. If the agreement had stopped after the words "to execute a new lease," there could have been no question of any option.

Greene K.C. in reply. The argument on behalf of the respondent only goes half way by contending that the new lease is to be equivalent only to part of the old lease.

POLLOCK M.R. In this case I have the misfortune to differ from my two brothers, and I need hardly say that I differ with reluctance and with diffidence, but I find myself in agreement with Tomlin J.

The point is an extremely short one, perhaps almost a point of first impression or, if not of first impression, of early impression. It is really the question of what is the proper construction of a document which was entered into between the executor of the lessor and the lessee and two new persons who wanted to come into the premises which were the subject of the lease. That document and the facts are fully set out in the report of this case in the Court below (3), and I think

(1) [1920] 2 Ch. 548. (2) [1924] 2 Ch. 42, 440. (3) [1924] 2 Ch. 252.

it is quite unnecessary to go through them again. Suffice it to say that the executor of the lessor entered into this agreement, which was in effect a tripartite agreement, releasing the old lessee and granting a new lease of these premises to new persons who came upon the scene, that is the Murphys. The lease which had up to that time been in existence was a lease for a term of $10\frac{1}{2}$ years from October 6, 1913. It expired therefore on April 6, 1924. There was in the lease an option which could be exercised by the lessee if he gave three months' notice to purchase the premises for 3000*l.* and there was a proviso to that option that the lessor could give notice to the lessee to terminate the option. That was the lease under which the premises were held. In November, 1915, the memorandum was prepared which was signed by Clarkson and by the Murphys, but which was not signed by Sawden, the executor of the lessor. I attach no importance of any sort to the fact that it was not signed by Sawden. As a matter of fact the defendants entered into possession of the premises; no new lease was ever prepared or executed, but owing to the operation of law the premises were held by the Murphys on terms which are applicable to the tenancy under the agreement which they had made and to which I have already referred.

Shortly, the question is whether or not the agreement by the Murphys to take as lessees the premises for the unexpired residue of the term in the lease dated October 17, 1913, entitles them to exercise the option which existed in the original lease of October 17, 1913. The operative part, if I may divide the memorandum into two parts, is this: "The said Alfred Murphy and C. L. Murphy to execute a new lease for the unexpired term of eight years and six months from sixth October last on the same terms and conditions in all respects as the lease of 17th October 1913 with the exception of the rent which until the cessation of the present hostilities shall be reduced to 82*l.* per year and during the remainder of the term at the rent reserved by the original lease."

Now is that new lease which they agreed to execute to

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contain this option or is it not? Two points I think have to be borne in mind at the outset of one's inquiries as to what is the meaning of those words. The first is that a covenant granting an option is in the nature of a collateral bargain and is not part of the tenancy in the strict sense. I adopt the words in which Tomlin J. expressed himself (1), and I also agree secondly with what Peterson J. said in the *Leeds and Batley Breweries* case (2), which has been referred to in the case before us, that an option to purchase the reversion and so destroy the tenancy is not really one of the terms of the tenancy. It is a provision which is outside the terms which regulate the relations between landlord as landlord and tenant as tenant. It is in truth and in fact a collateral bargain. It is not one of the terms of the demise. It is incidental but collateral to the demise. In the present case—and this I think is the only outside matter which has any weight upon my mind—there is this. It is quite clear that if the Murphys had taken by assignment of the original lease of October 17, 1913, they would have acquired this option. It would have passed to them under an assignment. But it appears to me that one ought to take into account the fact that assignment was not adopted to give the Murphys the interest which they were to take in these premises. Instead of taking by assignment, they take by a new agreement, they take under the terms of this memorandum. I reject really all outside matters, because one has to look at the terms of the memorandum itself and not to other matters. It appears to me that the observations which I called attention to in the previous case that was before us of *Sherwood* v. *Tucker* (3), in which I referred to a passage in a judgment of Lord Selborne in *Swinburne* v. *Milburn* (4), are applicable. That case says, I think, that if there is any onus on one side or the other, the onus lies upon the tenants of showing that they have taken under the terms of this agreement and taken advantage of this collateral agreement, if they are able to show that the collateral agreement

(1) [1924] 2 Ch. 254, 257.
(2) [1920] 2 Ch. 548.
(3) [1924] 2 Ch. 440, 444.
(4) 9 App. Cas. 844.

is part of the terms which have been conferred upon them. I agree with the observation made by my brother, Sargant L.J., on the question of onus. I think that these cases about covenants to renew and the like stand rather on a different footing, they stand outside the general considerations which ought to have weight with us; but I do think that what Lord Selborne said in *Swinburne* v. *Milburn* (1) on the question of onus is of some importance.

It appears to me that all the words that appear in this memorandum can be fully interpreted and sufficiently explained by allowing them to apply merely to the terms of tenancy, which is for eight years and six months, and that they do not necessarily involve the introduction of the collateral agreement to grant the option. I think that it has to be shown by the terms of the memorandum that the option was to be included. The words that have been used are no doubt "a new lease" and it is possible to say that means the document, but even if it does, you have got to deal with the words "same terms and conditions in all respects," that is, the terms and conditions relating to the unexpired term of eight years and six months, and in relation to that it is not certainly essential to have the means of putting an end to that term by the exercise of the option to purchase. I have looked at those words, and feeling that the necessity lies upon the Murphys to establish that they have acquired the option, I do not find the words which are sufficient to introduce that option into the memorandum, and I think, therefore, that they are not entitled to the benefit of a collateral agreement outside the terms of the tenancy. It is to be observed, as I think was observed in *Sherwood* v. *Tucker* (2)—it certainly was observed in the case before Peterson J. (3)—that very different considerations may apply to an option as time goes on, and the fact that the option has appeared in an earlier agreement does not compel one to the conclusion that the parties would be always ready to grant such an option. Under those circumstances I repeat

(1) 9 App. Cas. 844. (2) [1924] 2 Ch. 440.
(3) [1920] 2 Ch. 548.

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that I think the onus lies upon those who desire to exercise the option to show that the option was included, and inasmuch as I cannot find anything necessary to include the option, I think it was not included.

I agree with the reasoning of Tomlin J. when he comes to consider the actual terms of the memorandum. As I have already said, such matters as whether Sawden had the power as executor to enter into a bargain conferring an option and so on, do not have weight with me. It is simply on the construction of the agreement that I find myself in agreement with the conclusion which the learned judge has reached and, unhappily, in difference with the opinions of my learned brothers, to whose opinions, of course, I attach the greatest weight.

WARRINGTON L.J. The question which we have to determine is a pure question of the construction of the document of November 17, 1915. On October 17, 1913, a document, which is properly described as a lease of certain hereditaments, was executed by the predecessor of the plaintiff as lessor and by a man named Clarkson as lessee, and it was stipulated that the term "lessee" should include Clarkson's executors, administrators and assigns. That document contained an option for the lessee on the terms therein expressed to purchase the premises at a certain price. Having regard to the interpretation of the word "lessee" in the option, the word "lessee" means Clarkson, his executors, administrators and assigns. It is therefore quite clear, and it is admitted, that the benefit of the option, which although it is something collateral to the mere relation of landlord and tenant, still is one of the terms of the document which created that relation, would pass to the assignee by a mere assignment of the land for the term, at the rent, and under and subject to the conditions and so forth reserved by and contained in the lease of October 17, 1913.

We have here to deal not with the simple case of an assignment but with a transaction which in substance had the same effect, except that the original lessee was discharged

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from liability, as he would not have been discharged by a mere assignment. The document by which the transaction was carried out was the document of November 17, 1915. It was addressed to the then sole executor of the lessor. It was signed by Clarkson, the original lessee, and by the present defendants, the two Murphys, and it is in these terms: "In consideration of you," that is Sawden, "agreeing to release me the undersigned Herbert William Clarkson and accept us the undersigned Alfred Henry Murphy and Clementina Lucy Murphy as lessees for the unexpired residue of the term in the lease dated the 17th day of October 1913 and made between"—and then the parties are mentioned—"we respectively agree as follows: The said Herbert William Clarkson to surrender the said lease. The said Alfred Henry Murphy and C. L. Murphy to execute a new lease for the unexpired term of eight years and six months from the sixth October last on the same terms and conditions in all respects as the lease of 17th October 1913 with the exception of the rent which until the cessation of the present hostilities shall be reduced to 82*l.* per year and during the remainder of the term at the rent reserved by the original lease. Dated the 17th day of November 1915." The new lease was never executed, but the defendants entered into possession of the premises and paid rent, which was accepted by Sawden.

Now the question is, had the signature of this document with the contract created thereby the effect of giving to the Murphys the option of purchase which was contained in the original lease? The word "lease," if you get it by itself, may mean one of two things. It may mean, and in some cases has been held to mean, the relation of landlord and tenant or a mere contract of tenancy. On the other hand, it may mean and properly may mean the document by which that relation is created. In *Sherwood* v. *Tucker* (1) this Court held that the first of the two meanings, and that alone, could be attributed to the word as used in the contract which had there to be interpreted. That was a contract for an extension and the expression was "This lease to be

(1) [1924] 2 Ch. 440.

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extended." There it was only possible to read "lease" as meaning the contract of tenancy. You cannot extend the document; you can only extend the contract which is contained in it or which is recorded by it, and bearing in mind certain authorities which bore upon the question whether or not an option or a collateral bargain can be passed by a mere agreement to extend the tenancy or term or lease, or whatever you call it, we came to the conclusion that in that case the option did not pass, because the expression "lease" could only properly be construed as meaning the relation of landlord and tenant. But now in this case, when you come to the operative part of the document, that part which concerns the Murphys, with all respect to those who take a different view, it seems to me that it is impossible to give to the word "lease" any meaning except the document which effects the demise of the property. Now just let us look at the words. They are to execute a new lease. It is not that they are to become tenants for a certain term. They are to execute a new lease for the unexpired term of eight years and six months from October 6 last, and what is that document to be? It is to be a document on the same terms and conditions in all respects as another document—namely, the lease of October 17, 1913, with a certain exception not material to the present case. It is not to be a document containing some of the terms and conditions of the previous document; it is to be a document containing the same terms and conditions in all respects as the lease of October 17, 1913. To put it quite shortly, it seems to me here what the parties have done is they have agreed that the Murphys shall execute a new lease for which the other document of October 17, 1913, shall be the model, and that if Sawden had presented for execution a lease containing some of the terms and conditions contained in that model, the Murphys would not have been bound to execute it. It is quite true that Sawden does not agree himself to execute that lease, but, although he failed to agree to execute it, it can only be that they agreed to execute a lease—or in practice it would have been a counterpart of the lease—to be executed by Sawden, because

it is the execution by Sawden which creates the tenancy. But here you get an agreement, in the events which have happened, by the representative of the lessor to grant such a lease owing to the fact that the defendants were allowed to enter into possession and the representative of the original lessor accepted rent. It is said that by accepting rent Sawden merely created the relation of landlord and tenant, but he created the relation of landlord and tenant upon terms expressed in the memorandum, and those terms, if I construe the memorandum rightly, are that the whole of the stipulations contained in the original lease of October 17, 1913, were to be repeated in that which was to be executed by the Murphys. To put it in another way, in my view, you cannot in this agreement read the terms and conditions of the lease of October 17, 1913, except as including all its terms, and not merely those which relate to the relation of landlord and tenant by itself. I think, with all respect, that the judgment of Tomlin J. was incorrect, and that his decision ought to be reversed.

SARGANT L.J. In this case I agree with my brother Warrington that the whole question lies in the interpretation of the memorandum of November 17, 1915, and the real difference between the parties lies in this: Was the memorandum one which merely settled the terms of a document which was to be executed, or was it a memorandum which provided for a tenancy by one set of tenants in the place of another? In my judgment, the former is the true answer to the question. At the time when the memorandum was executed, the position was that Mr. Clarkson was holding as a lessee for the residue of a term of 10½ years from October 6, 1913, under a lease of October 17, 1913, and he was desirous of transferring the benefit of that lease to Mr. Murphy and Mrs. Murphy, and accordingly a document was drawn up for the purpose of effecting a transfer. Now it is to be noticed that if there had been a mere assignment by Clarkson to the Murphys, the necessary result would have been that the Murphys would have been entitled to the

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option of purchase given to Clarkson by the lease to him, and I should have thought that prima facie if it had been intended in any way to affect that option or prevent it being transferred in the ordinary course to the purchasers or the assignees, the persons intending to take the transfer from Clarkson, there would have been some definite bargaining to that effect. I do not want to lay too much stress on that, but it seems to me that would have been the ordinary business way of looking at the matter.

In that state of things the memorandum provides that the existing lessees are to execute a new lease for the unexpired term and on the same terms and conditions in all respects as the old lease, except for a particular exception. Now what does that mean? Is that providing that there shall be an acceptance of new tenants merely as tenants in place of the old, or is it an agreement for the execution of a particular document the terms and conditions of which are to be ascertained by reference to another document? Is it to be a document which is a replica, so far as the other document had not been exhausted by lapse of time, of the old document? In my judgment, the phrase "execute a new lease" seems to point quite markedly and clearly to the fact that what is being dealt with is a document that is to be executed, and I think that the criticism in reply of Mr. Greene as to Mr. Luxmoore's argument was justified, for Mr. Luxmoore seemed to accept the view that what was being provided for was the execution of a document, but he argued that that which was to be executed was a document which merely dealt with the relationship of landlord and tenant of Mr. Clarkson under the old document and, therefore, did not include the particular option of purchase under the lease. In my judgment, that argument is not sound. I cannot find in the memorandum any limitation of the terms of the document to those terms which regulate the relationship between landlord and tenant. It seems to me that the language of the memorandum provided for the execution of a document which should contain the terms and conditions, speaking quite generally, of the existing document without any limitation

of those terms to such as constitute the relationship of landlord and tenant. We had recently in this Court a somewhat similar case of *Sherwood* v. *Tucker* (1), and it seems to me that the decision to which we are now coming is in no way in conflict with the decision in that case, and I should like to quote something I said which brings that out, I think, quite clearly. It happens to be rather a curious anticipation of the present case, and I think that was due to certain arguments used in that case being very much the same arguments as have been used in the present case. There I say this: "Turning to this document, the phrase is 'this lease be extended for three years.' What does that mean? Does it mean that the term is to be extended or that the contract is to be extended with all its incidents? I think the word 'extension' is not really strictly applicable, properly used, with regard to the document. You cannot extend the document. You cannot extend the actual lease. It is a word properly applicable to the extension of the term of years granted by the lease, though I incline to think that a very slight alteration of the terms here might have produced a different result. If the parties had agreed that the house should be taken for a further term of three years upon all the terms upon which it was taken under this contract the result might very likely have been different." In my judgment that is really precisely what has taken place in the case which we are now deciding. The parties agree to take a new document the contents of which can be ascertained and determined by reference to the existing document—namely, the lease of October 17, 1913. In that view of the matter, it appears to me that we must come to the conclusion, or I have to come to the conclusion, that the option passes, because there can be no doubt that the portion of the existing document which created the option formed a part of the terms and conditions broadly speaking of the existing document.

In the view that I take of the case, it is not necessary to consider the cases which have been decided with regard to the renewal of leases. I think, as I said in the previous

(1) [1924] 2 Ch. 440, 449, 450.

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case, those cases really rest upon very special grounds, and I think also that no real importance is to be attached to a consideration which seems to have affected the learned judge's mind—namely, the question as to whether the executor of the original lessor was entitled to grant a lease with an option of purchase. For the option of purchase being one that was already existing and could have been transferred to the proposed transferee merely by an assignment, it seems to me that it was clearly within the power of the executor to carry out an arrangement which had precisely the same effect, although it was effected by means of a surrender and grant of a new lease.

Holding this view, I concur with my brother Warrington in the view that the appeal should be allowed, though naturally I do so with a good deal of hesitation in view of the respect one has for the learned judge in the Court below and for the opinion of the Master of the Rolls.

Appeal allowed.

Solicitors for appellants: *Collyer-Bristow & Co., for Stuart & Smith, Hull.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for West & Son, Bridlington.*

R. M.

SACK *v.* JONES.

ASTBURY J.

1925

Jan. 21, 22, 23, 26; Feb. 18, 19.

[1924. S. 2110.]

Easement—Support—Adjoining Houses—Party Wall—Implied mutual Rights of Support—Disrepair and Subsidence of House A—Drag on Party Wall—Damage to House B—Liability of Owner of House A.

The plaintiff and defendant were the owners of adjoining houses, separated by a party wall, and with implied mutual rights of support.

The plaintiff alleged that, owing to lack of repair and underpinning the defendant's house was subsiding, dragging the party wall over, and thereby damaging the plaintiff's house:—

Held, that the plaintiff's allegations had not been substantiated by the evidence, and (semble) even if they had been substantiated the plaintiff would have had no cause of action.

Colebeck v. *Girdlers Co.* (1876) 1 Q. B. D. 234 and *Jones* v. *Pritchard* [1908] 1 Ch. 630 applied.

Attorney-General v. *Roe* [1915] 1 Ch. 235 and *Broder* v. *Saillard* (1876) 2 Ch. D. 692 distinguished.

WITNESS ACTION.

The plaintiff and defendant were the respective owners of two adjoining leasehold houses in Torbay Road, Kilburn, held under repairing leases from a common landlord. The leases were dated May 17, 1888, and each term was for ninety-six years from June 24, 1887, at a 5*l.* ground rent.

The defendant's house, No. 91, which was in the occupation of her tenant, was the north end of a terrace with an outside flank wall on the north. The plaintiff's adjoining house, No. 89, which was in her own occupation, was divided from No. 91 by a party wall.

In these circumstances it was admitted that the plaintiff and defendant had implied mutual rights of support and mutual party wall rights.

In 1919 certain fractures and cracks appeared in the plaintiff's house, and early in 1924 they became serious, and there was other structural damage.

The plaintiff and her advisers attributed this damage to the fact that the 89/91 party wall was leaning towards No. 91, the defendant's house, the flank wall of which was also leaning slightly outwards. They attributed the condition

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of the party wall to an outward subsidence of the defendant's house and its flank wall, which they said was pulling the party wall over. The defendant's house itself was in good repair. It had only a few unimportant cracks, usual on clay soils, and apart from its slight tilt the flank wall was in good condition.

On May 17, 1924, the plaintiff commenced this action, alleging that the defendant's house, and in particular the flank wall, had fallen into disrepair, settled, and subsided, and by reason thereof and the tension put upon the party wall in consequence thereof the party wall had been deflected from the perpendicular and rendered unstable, with the result that the damage aforesaid had occurred. She also alleged that the defendant was not affording proper lateral support to the plaintiff's house and party wall, that the tension was continuing, and would cause further deflection and damage, and be dangerous and a nuisance to the plaintiff, and that for these reasons the defendant was using her house so negligently as to injure the plaintiff's house.

The plaintiff claimed: (1.) a declaration that the defendant was bound to afford the plaintiff's house, and in particular the party wall, proper lateral support; (2.) an injunction against withdrawing or withholding that support; (3.) an injunction against causing or permitting the party wall to be deflected from the perpendicular by the tension of the defendant's house, and from otherwise interfering with the plaintiff's enjoyment of the party wall and an order directing the defendant to underpin her house and party wall; (4.) an injunction against permitting the defendant's house to be in such disrepair as to be a nuisance to the plaintiff and from using the same so negligently as to injure the plaintiff's house; (5.) damages; (6.) further relief; (7.) costs.

The defendant traversed the plaintiff's allegations, and submitted that even if they were true, she had no cause of action.

The evidence as to the cause of the condition of the party wall and the damage was very conflicting. The plaintiff's experts attributed it to the outward subsidence of the

defendant's house and flank wall and the alleged drag on the party wall. The defendant's experts on the other hand scouted the drag theory on the ground of the good condition of the defendant's house and the want of sufficient tensile capacity in the walls to create such a drag. Both houses had slightly settled northward, and they attributed the condition of the party wall and the damage partly to settlement of the plaintiff's house and partly to an independent settlement of the party wall itself.

Topham K.C. and *R. F. Roxburgh* for the plaintiff. Our case is that owing to want of repair and underpinning the defendant's house and flank wall are pulling our party wall over, with the consequent damage. If we have established this, the plaintiff has a good cause of action.

The case may be put in three ways.

First. Having regard to *Jones* v. *Pritchard* (1) and *Browne* v. *Flower* (2) the plaintiff cannot as dominant owner compel the defendant to repair, but non constat that the defendant is not liable in damages if her non-repair results in a withdrawal of support and consequent damage.

Secondly. As servient owner the plaintiff has to support the defendant's house. The defendant as dominant owner has a reasonable right of push, but if by putting unreasonably heavy weights on her floors she pushed the plaintiff's house over she would undoubtedly be exceeding her easement. That would be an actionable private nuisance: Gale on Easements, 9th ed., p. 451. In the same way, assuming, which is not clear, that the defendant's easement of support gives her a moderate right of pull, she cannot be entitled to use it to the extent of pulling the plaintiff's party wall over. That is clearly exceeding her easement.

Thirdly. The defendant's house in its present condition is a dangerous structure and as such a common law nuisance: *Todd* v. *Flight* (3), and the defendant is responsible for any damage caused thereby: *Broder* v. *Saillard.* (4)

(1) [1908] 1 Ch. 630.
(2) [1911] 1 Ch. 219.
(3) (1860) 9 C. B. (N. S.) 377.
(4) 2 Ch. D. 692.

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[ASTBURY J. In the latter case damp came by percolation from the defendant's artificial mound. That was clearly trespass.]

It was also nuisance.

Archer K.C. and *Israel* for the defendant. Assuming, which we deny, that the defendant's house is unstable, and is pulling over the party wall, the plaintiff has still no cause of action.

The defendant, though subject to an easement of lateral support, is not thereby bound to repair her house. She has done no positive act to render her house unstable, if it is so in fact, which we deny. She is under no obligation to the plaintiff to keep it stable. If it subsides by the ordinary course of nature, the damage to the plaintiff is damnum absque injuria: Bullen and Leake on Pleadings, 8th ed., pp. 469, 505; *Chauntler* v. *Robinson* (1); *Colebeck* v. *Girdlers Co.* (2); *Jones* v. *Pritchard* (3); *Browne* v. *Flower.* (4)

[ASTBURY J. The plaintiff does not rely on her easement of support. She says that by allowing your house to get into such a state of disrepair as to pull her house down you are guilty of a common law nuisance.]

Her supposed rights are really based on her easement of support. Her proper remedy was to underpin our house and flank wall if she wished. She cannot base a nuisance action on mere non-feasance where no duty is owing to her.

[ASTBURY J. referred to *Hughes* v. *Percival.* (5)]

That was a positive act of negligence in cutting into a party wall. Here the defendant has done nothing at all.

[ASTBURY J. The plaintiff might possibly have succeeded in making you pay half the expense of putting the party wall right.]

That is not quite clear, and at any rate it is not the present action.

The present action will not lie: Bullen and Leake on Pleadings, 8th ed., pp. 469, 505; *Chauntler* v. *Robinson* (1);

(1) (1849) 4 Ex. 163.
(2) 1 Q. B. D. 234.
(3) [1908] 1 Ch. 630, 636, 637.
(4) [1911] 1 Ch. 219.
(5) (1883) 8 App. Cas. 443.

Colebeck v. *Girdlers Co.* (1); *Dalton* v. *Angus* (2); *Lyttelton Times Co.* v. *Warners* (3); *Jones* v. *Pritchard.* (4)

Topham K.C. in reply. Allowing a house to become so unstable as to pull down a neighbour's house is just as much an actionable nuisance as allowing the wall of a quarry to pull down a highway, as in *Attorney-General* v. *Roe.* (5)

Chauntler v. *Robinson* (6) was only a question of pleading. There was no actual decision on this point. *Colebeck* v. *Girdlers Co.* (1) was decided before the law of lateral support was clearly settled. It is not overruled by *Dalton* v. *Angus* (7), but the dicta clearly point to an obligation to give continual support, so that a right of property is infringed by its withdrawal, active or passive.

ASTBURY J., after dealing with the conflicting evidence as to the cause of the condition of the party wall and the damage, said that it was impossible to come to a definite conclusion as to that cause. It was perfectly consistent with an independent subsidence of the party wall itself. At all events the onus was on the plaintiff to establish that something in connection with the defendant's house had pulled over the party wall and caused the damage. That onus the plaintiff had certainly not discharged, and on the facts her action failed. His Lordship continued: But even assuming that the facts were as the plaintiff alleges—namely, that her party wall is being pulled over by the subsidence of the defendant's house and flank wall—she would have no justification in law for maintaining this action. Both parties have joint easements of support in respect of this party wall. But having regard to the authorities the plaintiff is unable to rely on her easement of support as giving her any remedy.

The plaintiff suggests however that the defendant by allowing her own house to fall away from the plaintiff's house and drag it down has committed an actionable nuisance.

(1) 1 Q. B. D. 234.
(2) (1881) 6 App. Cas. 740, 791, 826.
(3) [1907] A. C. 476.
(4) [1908] 1 Ch. 630.
(5) [1915] 1 Ch. 235, 239.
(6) 4 Ex. 163.
(7) 6 App. Cas. 740, 793, 808, 830.

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The only authority within measurable distance of that proposition is *Attorney-General* v. *Roe.* (1) In that case a limestone quarry was excavated alongside a highway. A slab of limestone was left as a retaining wall, on the top of which a fence wall was built to protect the public. The fence wall having collapsed and part of the subsoil and surface of the highway having fallen into the quarry, it was held that the quarry owner was liable for a common law nuisance. That is very far removed from the present case.

In *Broder* v. *Saillard* (2) the plaintiff's house was rendered damp by percolation from an artificial mound of earth placed against his house by the defendant's predecessor in title. This was held to be an actionable nuisance. It does not touch the present case.

In the present case the plaintiff and defendant acquired their houses as residences from a common owner. The defendant has done nothing more than allow her tenants to reside in her house, in accordance with the common intention of all parties at the time of the leases.

Now although the defendant's house is subject to an easement of support in favour of the plaintiff's house, the defendant is under no obligation to the plaintiff to keep her own house in repair for that purpose.

In *Colebeck* v. *Girdlers Co.* (3) the defendants owned 38 and 40 Basinghall Street, with a gateway under part of No. 40 and adjoining No. 38. In 1857 they demised No. 38, which included the gateway wall, to Smith for twenty-one years, subject to a covenant to repair walls and party walls. In 1865 they demised No. 40 to the plaintiff for eleven years subject to a similar covenant. The gateway wall was a party wall between No. 38 and the defendant's gateway up to the first floor. It then continued upwards as a party wall between Nos. 38 and 40. In 1874, owing to the defective condition and partial collapse of the gateway wall, which supported the plaintiff's party wall above it, the plaintiff's house suffered structural damage. In an action for damages

(1) [1915] 1 Ch. 235. (2) 2 Ch. D. 692.
(3) 1 Q. B. D. 234, 241.

for the defendants' failure to maintain the gateway wall as a sufficient support to the plaintiff's house it was held that there was no implied covenant by the defendants to support the plaintiff's house, though the failure to support it might be a defence to an action on the plaintiff's covenant to repair. In that case there was a direct contractual relation between the plaintiff and defendants under the lease, but no covenant to repair by the defendants.

Mellor J. said: "The plaintiff brought his action against the defendants to recover damages sustained by reason of the failure, as he alleged, of the defendants efficiently to support the house so demised by them to him. The question which we have to decide is whether, in the absence of an express covenant, there is, under the circumstances of the case, any implied covenant or grant on the part of the defendants to support and maintain the [gateway] wall in question, so as to prevent any sinking, or bulging, or other structural injury to the plaintiff's house by reason of the failure of such wall. . . . . It may be open to doubt whether the support of the plaintiff's house and the party wall was, strictly speaking, in the nature of an easement or not, but assuming that the right of support in this case is in the nature of an easement, founded on implied grant, it is well established that there is no obligation to repair on the part of the owner of the servient tenement, but the owner of the dominant tenement must repair, and that he may enter on the land of the owner of the servient tenement for that purpose: *Pomfret* v. *Ricroft*. (1) . . . . It was admitted by the defendants' counsel that they could in no respect do anything to withdraw or affect the support rendered by the party wall [i.e., the gateway wall] to the plaintiff's house; but he contended that no other or further obligation could be implied against them, and, this being our opinion, the defendants are entitled to judgment."

That is a far stronger case than the present. Even if there were any pull in the present case it can only have arisen from subsidence of the defendant's house and flank wall in

(1) (1669) 1 Saund. 321; Wms. Notes, 557 (1871 edition).

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the ordinary course of nature without any action on the part of the defendant.

The non-liability of the servient owner to repair appears also from *Chauntler* v. *Robinson* (1) and *Dalton* v. *Angus*. (2)

In *Jones* v. *Pritchard* (3) Parker J. speaking of an ordinary party wall granted in moieties with implied cross-easements said, " Subject, however, to the easements . . . . so implied, the grantor and grantee, being respectively absolute owners of their respective divided moieties of the wall, may respectively deal with such moieties in such manner as they please. Thus, if, for example, it is within the contemplation of the parties that the grantee shall support the roof of the house he intends to build upon that moiety of the wall . . . . comprised in the grant, the other moiety . . . . will be subject to an easement of lateral support for the benefit of the roof when erected; and similarly the grantee's moiety . . . . will pass to him subject to the easement of lateral support for the benefit of the grantor's roof if supported by his half of the wall. . . . . Authority . . . . for the above propositions . . . . will be found in *Richards* v. *Rose* (4) and . . . . *Lyttelton Times Co.* v. *Warners*. (5) The latter case seems to show that if a grantor is doing, on land retained by him, only what . . . . was at the time of the grant in the contemplation of the parties . . . . and is guilty of no negligence or want of reasonable care or precaution, he cannot be liable for nuisance entailed upon the grantee. And, of course, where the grantee is occasioning a nuisance to the grantor by doing on the land granted what . . . . was at the time of the grant in the contemplation of the parties . . . . and there is no negligence or want of care or precaution, the case is an a fortiori one." Later on he said (6): " It appears to me that, apart from any special local custom or express contract, the owner of a servient tenement is not bound to execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement by the owner of the dominant tenement. The grantor of a right of way over a

(1) 4 Ex. 163.
(2) 6 App. Cas. 740.
(3) [1908] 1 Ch. 630, 636.
(4) (1853) 9 Ex. 218.
(5) [1907] A. C. 476.
(6) [1908] 1 Ch. 637.

bridge is not by common law liable, nor does he impliedly contract, to keep the bridge in repair for the convenience of the grantee. On this principle neither party is in the present case subject to any liability if, by reason of natural decay or other circumstances beyond his control, his half of the wall falls down or otherwise passes into such a condition that the easement thereover becomes impossible or difficult of exercise." The present case follows a fortiori, as the defendant has done nothing but allow her tenant to occupy her house.

The plaintiff rightly relies on the fact that if an owner allows part of his house actually to fall on his neighbour's land he is liable to an action for trespass or nuisance. That proposition is not disputed.

The plaintiff then contends that the owner is equally liable if he withdraws support by allowing his house to fall away from and pull over his neighbour's house, but no authority is produced in support of that contention.

In the present case the defendant has done nothing at all. Her tenant resides in her house, which is in good repair. This action is brought owing to the belief of the plaintiff and her advisers that the defendant's house is pulling the plaintiff's over. That hypothesis has not been established, but if it had, I do not think that in the particular circumstances the defendant would be in any way liable. The action fails, and must be dismissed with costs.

Solicitors: *Frank Daphne; Donaldson & Co.*

G. R. A.

TOMLIN J.

1925

Jan. 23.

In re KUYPERS.

KUYPERS *v.* KUYPERS.

[1924. K. 865.]

Will—Bequest of Shares—Subsequent Change in Name of Shares and Rights attached thereto—Issue of additional fully-paid Shares to compensate for Loss—Effect on Bequest.

By her will made in 1920 a testatrix bequeathed 600 15 per cent. cumulative preferred ordinary shares of 1*l.* each in a company to trustees upon trust to pay the income to a tenant for life during his life and with a direction that after his death the shares should fall into residue. Subsequently during the lifetime of the testatrix the company reorganized its capital by (inter alia) changing its 15 per cent. cumulative preferred ordinary shares into a like number of 8 per cent. cumulative A preference shares of 1*l.* each and at the same time issuing to a former holder of 15 per cent. cumulative preferred ordinary shares the same number of new 8 per cent. cumulative A preference shares of 1*l.* each paid for in full out of reserves:—

Held, that the tenant for life was entitled only to the income of the 600 8 per cent. cumulative A preference shares, which were really the original 600 15 per cent. cumulative preferred ordinary shares with an altered name and a reduced right to dividends; and that he took no interest in the new 600 8 per cent. cumulative A preference shares which were issued to the testatrix by way of compensation for the reduction in the rights attached to her original holding of shares.

The principle laid down in *In re Slater* [1907] 1 Ch. 665, 672 applied.

ADJOURNED SUMMONS.

By her will dated January 21, 1920, Catherine M. G. Kuypers, after appointing the plaintiffs to be her executors and trustees and giving a pecuniary legacy, bequeathed to her trustees 600 15 per cent. cumulative preferred ordinary shares of 1*l.* each in Lever Brothers, Ld., with power either to retain such shares or to sell the same and invest the proceeds in trust securities and upon trust to pay the income arising from the said shares or from the investments representing the same unto the Rev. Oswald F. Thornton during his life; and she directed that after his death the said shares or the investments for the time being representing the same should fall into and form part of her residuary estate. The testatrix then gave a number of pecuniary legacies and devised and

bequeathed all the rest of her real and personal estate to her four sisters.

The testatrix was at the date of her will the registered holder of 1500 15 per cent. cumulative preferred ordinary shares of 1*l.* each in Lever Brothers, Ld. These shares conferred on the holder the right to a fixed cumulative preferential dividend at the rate of 15 per cent. per annum and the right in a winding up to payment off of capital and arrears of dividends, whether declared or undeclared, up to the commencement of the winding up in priority to the ordinary shares. They did not confer any further right to participate in the profits or assets. In June, 1920, special resolutions were passed authorizing the increase of the capital of the company by (inter alia) the creation of 20,000,000 new shares of 1*l.* each to be called 8 per cent. cumulative A preference shares, and providing that the existing class of 10,000,000 15 per cent. cumulative preferred ordinary shares of 1*l.* each, together with an existing class of 10,000,000 15 per cent. cumulative A preferred ordinary shares and together also with the 20,000,000 new shares of 1*l.* each, should be consolidated together so as to form one class of 40,000,000 shares of 1*l.* each to be called 8 per cent. cumulative A preference shares. These shares conferred on the holder a fixed cumulative preferential dividend at the rate of 8 per cent. per annum and the right in a winding up to preferential payment of the capital and any arrears of dividend, whether declared or undeclared, up to the winding up. They did not confer any further right to participate in the profits or assets. It was at the same time resolved that part of the undivided profits of the company, including sums standing to the credit of reserves, should be capitalized and applied in payment in full for (inter alia) the same number of new 8 per cent. cumulative A preference shares as there had been holders of the 15 per cent. cumulative preferred ordinary shares and 15 per cent. cumulative A preferred ordinary shares, such shares when so fully paid up to be distributed amongst the four holders of 15 per cent. cumulative preferred ordinary shares and 15 per cent. cumulative A preferred ordinary shares.

TOMLIN J. 1925 KUYPERS, *In re.* KUYPERS v. KUYPERS.

As a result of these resolutions, the testatrix became the holder of 3000 8 per cent. cumulative A preference shares in lieu of 1500 15 per cent. cumulative preferred ordinary shares.

In January, 1921, the testatrix sold 1000 of these shares, but she was still the holder of 2000 8 per cent. cumulative A preference shares at the date of her death on June 4, 1924.

This summons raised the question whether upon the true construction of the testatrix's will and in the events which had happened of the 600 15 per cent. cumulative preferred ordinary shares of 1*l.* each in the capital of Lever Brothers, Ld., having been converted in the lifetime of the testatrix into 1200 8 per cent. cumulative A preference shares of 1*l.* each in the same company the defendant Thornton was entitled during his life to the dividends and income on the said 1200 shares or to any other and what dividends or income.

K. G. Metcalfe for the summons.

W. E. Vernon for the Rev. F. Thornton. The effect of the arrangement made by Lever Brothers, Ld., was that the testatrix received in respect of each 15 per cent. cumulative preferred ordinary share held by her two 8 per cent. cumulative A preference shares. The preferred ordinary shares had no participatory rights but were really preference shares, so that the two new shares are substantially the old 15 per cent. share. It is possible therefore to trace the share into something which, though changed in name and form, is substantially the same, and there is no ademption: *In re Leeming* (1); *In re Clifford.* (2)

J. V. Nesbitt for persons interested in residue. This was not a specific legacy at all. It is not a legacy by the testatrix of *her* stock but of certain stock. The stock is therefore a mere measure of the value of the general legacy. That value can no longer be ascertained, and the legacy therefore fails: *In re Gray.* (3)

[TOMLIN J. [If you apply the principle of tracing the

(1) [1912] 1 Ch. 828. (2) [1912] 1 Ch. 29.
(3) (1887) 36 Ch. D. 205.

stock recognized in modern times, it might be possible to determine the value of the legacy even if it be a general legacy.]

The principle of tracing the subject matter of a specific legacy is of old standing: *Oakes* v. *Oakes* (1); and it is not applicable to general legacies. The principle of *In re Gray* (2) is recognized in Jarman on Wills, 6th ed., p. 1080.

If however the principle of tracing the stock is applicable to a general legacy, it becomes immaterial whether the legacy is specific or general. Upon that footing, the tenant for life is entitled to the income of 600 8 per cent. cumulative A preference shares and no more. This is not a case where the original shares have ceased to exist; they still exist with a new name and reduced rights: compare *In re Lane.* (3) The additional share allotted in respect of each original 15 per cent. cumulative preferred ordinary share was allotted by way of compensation for the loss of rights. The tenant for life can claim no interest in the 600 additional shares so allotted any more than he could if the testatrix had received in compensation for the loss of rights a sum of cash.

Vernon in reply. This was a specific legacy, but it really makes no difference whether it was or not for the present purpose. The Court has to decide this case upon the principle laid down in *In re Slater.* (4) Here the two new 8 per cent. shares are substantially the same thing as the original 15 per cent. share.

TOMLIN J. The question which I have to determine is the effect in the events which have happened of a gift by the testatrix to her trustees of 600 15 per cent. preferred ordinary shares of 1*l.* each in Lever Brothers, Ld., on trusts under which the income of the shares is given to a tenant for life with a direction that after his death the shares should fall into residue.

The shares in question were in effect preference shares

(1) (1852) 9 Hare, 666.
(2) 36 Ch. D. 205.
(3) (1880) 14 Ch. D. 856.
(4) [1907] 1 Ch. 665, 672.

TOMLIN J. 1925 KUYPERS, *In re.* KUYPERS *v.* KUYPERS.

entitled to a fixed cumulative dividend of 15 per cent. and to nothing more in the way of a dividend and entitled, in a winding up, to preferential payment of the capital and arrears of dividends and to no further interest in the assets. The testatrix had at the date of the will a substantially larger number of these shares than was mentioned in this bequest.

At a later date there took place a reorganization of the capital of Lever Brothers, Ld., under which the capital of the company was varied by (inter alia) the creation of 20,000,000 new shares of 1*l.* each to be called 8 per cent. A preference shares. These shares were paid up by means of the appropriation for the purpose of sums standing to the credit of reserve, and at the same time the existing 15 per cent. preferred ordinary shares had their rights modified to the extent that their dividend was cut down from 15 per cent. to 8 per cent. per annum, and that their name was changed to 8 per cent. A preference shares; and they were made to form one class with the new 20,000,000 shares. As a result of this reorganization each holder of a 15 per cent. preferred ordinary share retained his share altered in name and with its rights curtailed in the manner I have indicated, and at the same time he had allotted to him another share of the same class which had been fully paid by the application of part of the reserve fund for the purpose.

No alteration was made by the testatrix in her will as the result of this alteration in her holding of shares, and the question now arises what effect is to be given to the bequest in the will.

The principle to be applied is stated by Cozens-Hardy M.R. in *In re Slater* (1) when he says: "Where is the thing which is given? If you cannot find it at the testator's death, it is no use trying to trace it unless you can trace it in this sense, that you find something which has been changed in name and form only, but which is substantially the same thing." On that principle cases such as *In re Clifford* (2) have been decided. There was in that case a gift of twenty-three

(1) [1907] 1 Ch. 665, 672. (2) [1912] 1 Ch. 29.

shares that were originally shares of 80*l.* each. They were afterwards sub-divided into a larger number of shares of 20*l.* each, so that the testator had at his death four times the number of shares of this reduced nominal value. It was held that the twenty-three shares bequeathed by the will were still substantially in existence in their sub-divided form and passed under the gift.

In re Leeming (1) was an even stronger case, and the facts there were very different, as they involved the formation of a new company. Except as an example of the application of the same principle this case does not appear to have any precise value in connection with the present case.

It seems to me that I must come to the conclusion in this case that the gift takes effect, but as to the original shares only. I can find here the actual shares that were referred to in the will. It is true that their name has been changed and that they have lost some of their attractiveness; but they remain the same shares, with a continuous history since before the will was made. The other shares were wholly new shares subscribed and paid for out of the reserve fund; and although those allotted to the testatrix were allotted as part of the arrangement and in view of the alteration in the rights of the original shares, that circumstance does not to my mind justify me in coming to the conclusion that they are part of the original holding of shares. They seem to me to be in the nature of a form of compensation for loss of rights, but a form of compensation which cannot be treated as the thing itself.

If I took any other view that which passed would be something greater than that which was given. It would not only be a gift of shares of double the nominal value, but it would be a gift of shares having a somewhat greater return by way of dividend than the shares in the original gift. And yet I am not in a position to apportion, and the result of the arrangement made by the company was not a mere substitution of one thing for another of equal value, but a substitution of something different and greater in value. I do not think

(1) [1912] 1 Ch. 828.

TOMLIN J. 1925 KUYPERS, *In re.* KUYPERS *v.* KUYPERS.

therefore that the tenant for life can substantiate a claim to the income of not merely 600 but 1200 of the 8 per cent. A preference shares. I will therefore declare that the gift takes effect as to the 600 original shares and no more.

Solicitors: *Gasquet, Metcalfe & Walton.*

H. C. G.

C. A. 1924 RUSSELL J. *Oct.* 24. C. A. *Dec.* 4, 5.

ROSLER *v.* HILBERY.

[1924. R. 1261.]

Practice—Service out of Jurisdiction—Company established Abroad—Sequestrator appointed—Asset of Company in Hands of Agent in England—Undertaking by Agent not to part with Asset—Action in England by Members of Company against Agent and Sequestrator—Plaintiffs Foreigners and resident Abroad—Forum conveniens—Service of Notice of Writ on Sequestrator out of Jurisdiction—Injunction—"Necessary or proper party"—Order XI., *r.* 1, *sub-rr.* (*f*) *and* (*g*).

By Order XI., r. 1: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever . . . . (*f*) Any injunction is sought as to anything to be done within the jurisdiction . . . . or (*g*) Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

A company established in Belgium was, owing to a preponderance of enemy interest therein, ordered by the Belgian Court to be wound up, and a sequestrator, the defendant C., was appointed to collect the assets, to satisfy the creditors, and if there were any surplus assets to distribute them among the members of the company in accordance with their rights. A company in England, which was being wound up under the Trading with the Enemy Act, was found to owe the Belgian company a sum of 22,500*l.* Under an order of the Court made in the winding up this sum was, at the request of the defendant C., paid to the defendant H., a solicitor in London, who gave an undertaking not to part with it until further order. An action was then commenced by the three plaintiffs, who were members of the Belgian company, all aliens and resident abroad, against the defendants C. and H., claiming an injunction to restrain the defendant H. from parting with 22,500*l.*, which was described as representing moneys belonging to the persons who formerly constituted the Belgian company, an inquiry as to how much thereof was due and payable to the plaintiffs respectively, and an order on the defendant H. to pay such amounts to the plaintiffs respectively. An order was subsequently obtained by the plaintiffs ex parte giving them liberty to serve a notice of the writ of summons out of the jurisdiction on the

defendant C. at Antwerp. On an application by the defendant C. to discharge the order:—

Held (by Russell J. and the Court of Appeal), that the forum conveniens was the Belgian and not the English Court, and that the order for substituted service must therefore be discharged and the service of the notice of the writ on the defendant C. set aside.

Held also by the Court of Appeal (Russell J. expressing no decided opinion on the point):—

1. That having regard to the undertaking given by the defendant H. the injunction was not really part of the relief sought and was wholly unnecessary, and was asked for only to found the jurisdiction of the Court to make an order for substituted service, and accordingly that the substance of the case did not fall within sub-r. (*f*) of r. 1 of Order XI.

2. That the primary defendant was the defendant C. and not the defendant H., who was only a subordinate and secondary defendant, and that the case therefore did not fall within sub-r. (*g*) of r. 1 of Order XI.

MOTION.

Before and during the war there was established in Belgium a company called Zeller Villinger & Co. It was a société en commandite, and the members of which it was composed were, as to some of them, under limited liability, and, as to others, under unlimited liability. The company itself was, according to Belgian law, a separate entity. There were ten members of the company, of whom six were of enemy nationality, German or Austrian, one was an American, and the three remaining members were the plaintiffs. At the outbreak of the war the company was, owing to the preponderance of enemy interests therein, ordered by the Belgian Court to be wound up, and the defendant, M. Georges Caroly, was appointed sequestrator to deal with its assets, to pay its liabilities, and to receive the debts due to it. Among the debts owing to it was one of 22,500*l.*, by a company in England called Winter & Co., Ld., which was being wound up under the Trading with the Enemy Acts. That sum accordingly became payable to the defendant Caroly as sequestrator of Zeller Villinger & Co., and on May 2, 1924, an order was made in the winding up of Winter & Co. and another company also carrying on business in England in which the three plaintiffs appeared, one of whom was a Czech, one a Belgian, and one a Swiss, all of whom were resident abroad, that the 22,500*l.* should, at the request of the defendant Caroly, be

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paid to the defendant Hilbery, as his solicitor and agent in this country. At the same time an undertaking was given to the Court by the defendant Hilbery that he would not part with the 22,500*l.* for twenty-one days, and that if within that period proceedings were commenced in this country by the plaintiffs he would not part with it until further order. Within the twenty-one days the plaintiffs commenced the present action against the defendants Hilbery and Caroly, claiming by their writ: (1.) an injunction to restrain the defendant Hilbery from transferring or paying to the defendant Caroly, otherwise than with the consent of the plaintiffs or the order of the Court, the whole or any part of the 22,500*l.*, representing moneys belonging to the persons who formerly constituted the Belgian company of Zeller Villinger & Co., and the persons claiming through or under such persons respectively; (2.) an inquiry as to how much of such sum was due and payable to the plaintiffs respectively; (3.) an order on the defendant Hilbery to pay such amounts to the plaintiffs respectively; and (4.) all further requisite accounts and inquiries. The writ was served on the defendant Hilbery in this country, and on July 1, 1924, an order was obtained ex parte from Tomlin J. for leave to serve notice of the writ out of the jurisdiction on the defendant Caroly at Antwerp. Service of the notice of the writ was duly effected and a conditional appearance was entered by the defendant Caroly.

A motion was now made on behalf of the defendant Caroly to discharge the order of Tomlin J.

Wilfrid Hunt for the motion. The action having been commenced within twenty-one days after the order was made by Tomlin J. there is a continuing undertaking by the defendant Hilbery not to part with the money. There was, therefore no ground for asking for an injunction against him. The question is whether the case comes within Order XI., r. 1 (*f*) or (*g*). If there was no reason for asking for an injunction then it does not come within sub-r. (*f*). Apart from the claim for an injunction there was no reason for

making the defendant Hilbery a defendant. The case was therefore not within sub-r. (*g*), as the defendant Hilbery was not a necessary or proper party to the action. Even if the case did come within Order XI., r. 1, the Court has a discretion whether it will make an order, and in the present case it ought in the exercise of its discretion to have refused to make one.

Spens for the plaintiffs. The question is whether the plaintiffs have so brought themselves within the rules that they can bring their action here, and claim an injunction. The defendant Hilbery was a necessary party to the action, because the fund, the subject matter of the action, was in his hands and under his control at the date of the issue of the writ. The fund in which the plaintiffs have a beneficial interest is within the jurisdiction of this Court, and it is in the hands of the defendant Hilbery. No order can be made against him, unless in the presence of the defendant Caroly, the other party interested in the fund. The plaintiffs have, therefore, a properly constituted action under sub-r. (*g*). The Court is simply asked to decide how much of the fund belongs to the plaintiffs. In *In re Lane* (1), where part of the assets was in England and part in Jersey, it was held that the action should be brought in England. In *Massey* v. *Heynes* (2) it was held that foreign principals were proper parties to the action, and that service on them out of the jurisdiction of notice of the writ might be allowed. As to the discretion of the Court, it is really a question of whether there are any very great difficulties in making the necessary inquiries here. There are no such difficulties in this case. The plaintiffs have brought themselves within the rules.

RUSSELL J. This is a motion by one defendant in the action, asking that a certain order, whereby liberty was given to serve notice of a writ on that defendant at Antwerp, may be discharged, and that service of the notice of the writ on that defendant, and all subsequent proceedings in the action as against him, may be set aside. [His Lordship stated the facts and continued:] The question argued

(1) (1886) 55 L. T. 149. (2) (1888) 21 Q. B. D. 330.

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before me has been twofold; first of all whether the case was one in which the Court had jurisdiction to make the order at all—that is to say, whether the case was one which fell within any of the provisions of Order XI.; secondly, assuming that it did, whether it was a case in which, in the discretion of the Court, the Court being properly informed, it would exercise its discretion in favour of granting leave to effect service. The two provisions of Order XI. under which it is alleged that the case falls are r. 1, sub-r. (*f*), where "Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof," and sub-r. (*g*), where "Any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." Mr. Spens says he is within both those sub-rules. He says: "An injunction is sought, therefore I come within sub-r. (*f*)." It is true that, on the face of the writ, an injunction is sought, but an injunction, in my opinion, ought not to have been sought, because there was already the undertaking given to the Court by Mr. Hilbery not to part with the fund. Then he says that there was, in Mr. Hilbery, a good defendant, and that there was an action properly brought against Mr. Hilbery, who was and is now within the jurisdiction, and that, even if he is wrong as to the injunction, he is entitled to claim against Mr. Hilbery an order upon him to pay over the fund. Mr. Hunt, on the other hand, contends, on the facts of this case, that it does not fall within the wording of either of those sub-rules. Personally, I entertain grave doubts as to whether the case comes technically within either sub-r. (*f*) or sub-r. (*g*), but I will assume in Mr. Spens' favour that it does. Even then, the Court has in such matters a discretion, and one of the matters which the Court properly entertains in coming to a conclusion as to whether or not it should exercise the discretion is, which is the forum conveniens. I have no hesitation in saying that, if the full facts had been known at the time when the application was made for leave to

serve, and if it had been realized that this fund formed part of the assets of the Belgian firm or company which was in process of being liquidated by a sequestrator properly appointed by the Belgian Courts, where the rest of the assets are, and if it had been realized that what the plaintiffs claimed to be entitled to—namely, this fund itself—was not a good claim, but that all they were entitled to was their proportion of so much of it and the other assets as remained after the sequestrator in due course of liquidation had paid off the Belgian and the other creditors of this Belgian company; if these facts had been realized, I have no hesitation in saying that the judge who made the order would not have exercised his discretion in the direction of giving leave to serve notice of the writ in this action, so as to bring the Belgian sequestrator before this Court in order to have one of the assets of the firm of which he was sequestrator administered here by the British Court. I have no doubt that the forum conveniens in this case is the Belgian, and not the British Court. Accordingly I make the order asked for by Mr. Hunt, and I discharge the order first made, and I set aside the service of the notice of the writ on the defendant Caroly.

P. J. B.

The plaintiffs appealed. The appeal was heard on December 4, 5, 1924.

G. B. Hurst K.C. and *Spens* for the appellants repeated the arguments used on behalf of the appellants in the Court below.

Clayton K.C. and *Wilfrid Hunt* for the respondent were not called upon to argue.

POLLOCK M.R. This is an appeal from an order made by Russell J. acceding to a motion made to him to set aside the service of notice of the writ for which ex parte leave had been granted by Tomlin J. I am of opinion that the decision of Russell J. is right, and I agree with him, both in his conclusion and in the reasons on which he founds that conclusion.

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This is a case in which a claim is made by three plaintiffs, all of whom are aliens and resident abroad. One is a Czech, one a Belgian and one a Swiss. They bring an action against two defendants, Mr. Hilbery, a solicitor in London, and M. Georges Caroly, a Belgian resident in Belgium. The claim is for a certain portion of a fund which is to be distributed in the course of the liquidation of a company called Zeller Villinger & Co. That was a Belgian société en commandite. The persons who compose such a company are as to some under limited liability, and as to others under unlimited liability. A sequestrator was appointed at the outbreak of the war because of the enemy interests in that société en commandite, and the defendant, M. Georges Caroly, is the sequestrator, who has been appointed to deal with the assets to pay its liabilities and to receive the sums due to it. Among the sums due to it is a sum which falls to be payable by Winter & Co., Ld., also a company in which there were enemy interests. Put shortly, what the plaintiffs claim is that with regard to a sum of 22,500*l.* to be paid by Winter & Co., Ld., to M. Georges Caroly as the sequestrator of Zeller Villinger & Co., they ought to be allowed to bring an action here in respect of their interest in that sum, and they asked for and obtained ex parte leave to serve M. Georges Caroly as a party resident abroad, but necessary to this action.

Now I quite agree with Russell J. that if it had been appreciated by Tomlin J. when the matter was before him and the ex parte leave was asked to serve notice of the writ upon M. Georges Caroly out of the jurisdiction, that the plaintiffs were not in fact entitled to this sum of 22,500*l.*, but to some sum, whatever it might be, being a proportion of the ultimate balance after the affairs of the Zeller Villinger & Co., the société en commandite, had been wound up and the rights of the parties ascertained, he would not have granted the leave he did. It seems to me almost a confusion of thought to say that M. Georges Caroly is a necessary party to the action which is brought against Mr. Hilbery. It is an inversion of the real facts of the case. Mr. Hilbery is

the solicitor of M. Georges Caroly, and originally he gave some undertaking that he would hold this sum of 22,500*l.*, which was to be paid into his hands as the agent for M. Georges Caroly, the sequestrator of the société en commandite, and would not part with it if an action were begun here by four named persons within a given time, but it did not at all follow that in all circumstances that was to be taken as an admission by Mr. Hilbery, still less by M. Georges Caroly, that a proper action could be founded over here in respect of this sum of 22,500*l.* As a matter of fact the action that was contemplated was not brought. The action was to have been brought by four plaintiffs, and there are but three, one person is missing, but, to use Mr. Hurst's expression, as an act of grace Mr. Hilbery continued an undertaking—at least I will not call it an undertaking, for I do not think it was an undertaking to the Court—he continued an assurance that he would hold the fund for the time being to see whether or not some powers could be exercised which should restrain him or prevent him from handing the money, as he was in duty bound to do, to M. Georges Caroly, on whose account he had received it and to whom he was bound to pay it. Now this action that has been brought by these foreigners resident abroad is, in the first instance, started against Mr. Hilbery. It appears to me that Mr. Hilbery's interest in this fund is really of the slenderest kind. In truth and in fact it might be said that he has no interest at all. His position is merely that of the agent of M. Georges Caroly, and the substantive matter that would have to be tried is this: What rights have the three plaintiffs against M. Georges Caroly, the sequestrator of the société en commandite? If and when it was ascertained that the plaintiffs had subsequent rights against M. Georges Caroly then a subsidiary order might be made as to the funds which are now in the hands of Mr. Hilbery. But any order which Mr. Hilbery would be bound to obey would be subsidiary to and really dependent upon the establishment by the plaintiffs of some rights against M. Georges Caroly, who is entitled to the fund.

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It is said that the case falls either within sub-r. (*f*) or sub-r. (*g*), or within both, of r. 1 of Order XI. Rule 1 provides that: "Service out of the jurisdiction of a writ of summons or notice of a writ of summons may be allowed by the Court or a judge whenever . . . . (*f*) Any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof." I share the view that was expressed by my Brother Sargant yesterday, that there are grave doubts as to whether the injunction which, in fact, is here claimed, is such an injunction as is contemplated by sub-r. (*f*). I think if the claim of the plaintiffs was put in its proper order instead of finding item (1.) an injunction, one ought to find a different claim to which this claim for an injunction would be incidental, because the injunction really is only to restrain Mr. Hilbery from transferring the fund to the defendant, M. Georges Caroly, until the rights of the parties have been ascertained. I do not think for myself that an injunction of such a fleeting nature is the sort of injunction which is referred to or indeed to be included in sub-r. (*f*). But whether that be so or not, let me give Mr. Hurst's clients the benefit of the doubt and say that ex facie the claim is one which falls within sub-r. (*f*). With regard to sub-r. (*g*) I have already said I do not think that M. Georges Caroly is a necessary or proper party to this action, because the position is really inverted. The action ought properly to have been brought against M. Georges Caroly, and it may be that Mr. Hilbery would then have been a necessary or proper party to be brought into the action in order that he might have the authority of the Court in any judgment given which would be binding upon him to obey. But let me assume without saying more that the case is prima facie within sub-r. (*f*) and within sub-r. (*g*). I agree with Russell J. in thinking that this is clearly a case in which leave to serve notice of the writ ought not to have been granted, even assuming the actual terms of Order XI., r. 1, sub-r. (*f*) and

sub-r. (*g*), or both of them, to have been technically complied with.

It must be remembered that the terms of Order XI., r. 1, are not that in cases which come within and fit into the sub-rules leave to serve notice of the writ out of the jurisdiction shall be granted, but that service of a notice of writ of summons may be allowed by the Court in the circumstances recapitulated in the sub-rules. The jurisdiction is discretionary, and there is no question that in deciding whether or not it will exercise its discretion the Court pays attention to a great number of matters, in particular it would pay attention to what is the forum conveniens. It would have regard to what is the substance of the matter that has to be decided. If regard is to be had to the forum conveniens I can imagine no forum less convenient than the Court of this country, because what will have to be decided is what is the sum to which three foreigners, none of whom is resident in this country, are entitled in the ultimate winding up and distribution to be made of a Belgian société en commandite, which has been in the hands of a Belgian resident in Antwerp for a considerable number of years. That will have to be decided according to Belgian law, and it seems to me quite impossible to suggest that the Court of this country would be a suitable forum in which to determine the rights of the plaintiffs. But I go further. What is the substance of this case? It is all very well to comply with the letter of the sub-rules of r. 1, but one ought to have regard to the true spirit of the rule. I will not refer to the very great number of cases which have been decided upon this rule save one, and that is the recent case of *Johnson* v. *Taylor Brothers & Co.* (1) It is quite true that the facts of that case were very different from those in the present case, but there are some observations made by the learned Lords which are, I think in principle, applicable to the considerations which I must bring to the decision of this case. In that case there was a definite and primary breach of contract which was committed outside the jurisdiction. There was a subsidiary and

(1) [1920] A. C. 144.

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secondary suggested breach of contract which, for the purpose of endeavouring to bring the action over here, it was alleged, and rightly alleged, was committed within the jurisdiction. But the learned Lords, in giving their decision, founded it not merely on the question of whether or not the sub-rules had technically been complied with, but on the substance of the matter to be tried, and whether or not they could in truth decide that the notice of the writ, if allowed to be issued, would be ancillary and necessary to the substantial matter which would have to be and ought to be decided over here. Lord Birkenhead in his speech points out what is the original nature of this jurisdiction, and Viscount Haldane, referring to Order XI., r. 1, says (1): "What it does is, while leaving intact the old principle that by the law of England jurisdiction depends, broadly speaking, on presence within the jurisdiction, to enable the Court to give special leave for service out of the jurisdiction in certain circumstances. The Court may do so, that is to say that the Court has a new power which it is enabled to exercise in particular cases which seem to it to fall within the spirit as well as the letter of the various classes of case provided for." Now applying that reasoning to the present case, it seems to me that there is no substance in the claim against Mr. Hilbery. There is only a right which would be determined by the particular order made upon him as a mere and bare custodian of funds after the determination of the rights as between the plaintiffs and M. Georges Caroly. In the same case Lord Buckmaster says (2): "It must, however, be remembered that the issue of the writ, even in a case within the words of the rule, can only be made by leave of the Court, and in granting such leave regard ought to be had to the real breach "—he is there, of course, speaking of breach of contract in that case—"in respect of which the action is brought, and not merely to a breach on which it is necessary to rely, not to obtain relief, but only to found jurisdiction under the rule." In other words, regard ought to be had in this case to what is the real substance of the matter which has to be tried and not to

(1) [1920] A. C. 153. (2) [1920] A. C. 160.

a matter on which it is necessary to rely not to obtain the integral relief necessary, but merely for the purpose of founding jurisdiction under the rule. It appears to me that that is why Mr. Hilbery has been joined in the action; that is why the application has been made to us. If the true substance of the matter is looked at this is really an action by these plaintiffs against M. Georges Caroly resident at Antwerp, and that is where the substance of the matters which will determine the question in issue between the parties took place and ought to be determined, and it is Belgian law which will decide the rights of the parties. I have only added these observations in deference to the argument presented to us by Mr. Hurst, but I agree with the conclusion of Russell J., and I think the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. I really have nothing to add to the judgment of Russell J. on the point on which he in fact decided the case before him. It seems to me that it would be perfectly absurd to have a person proceeding in this country with reference to the rights of some of the shareholders in a company which is being wound up in Belgium. How could the Court ascertain the interests of those shareholders without first ascertaining what are the debts of the company, what are the liabilities properly payable out of its assets and how the assets are to be distributed? It cannot possibly ascertain their interests without going into the winding-up proceedings, and it is quite plain that orders made here may, possibly through ignorance of the law and practice of the Belgian Courts, conflict with directions given to M. Caroly out there, and this Court would be reduced to a perfectly absurd position.

But I do desire to say a word or two as to the jurisdiction. With regard to sub-r. (*f*) in my opinion the plaintiffs have not brought their case within it. The injunction is not part of the relief claimed. It is incidental only to the relief claimed in order to keep things in statu quo until the nature of that relief can be determined and given effect to by an

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order of the Court. This is just one of those cases where a claim for an injunction is made, I should conclude, for the express purpose of bringing the case if possible within that sub-rule. Then with regard to sub-r. (*g*) I am also of opinion that the case does not come within that sub-rule, and for this reason, that it is not shown by the plaintiffs that the action is properly brought against Mr. Hilbery, the defendant in this country. The affidavit does not say so, and it shows no facts from which we can infer that there is any right of action in these plaintiffs at all against Mr. Hilbery. It is proved by their own affidavit that the Belgian société en commandite is a legal entity in itself. It is also proved on the present application that the 22,500*l.* is money of that legal entity, because it has been certified to be money due to that company, and the order has been made to pay it to the sequestrator of that company. It seems to me that when one finds an action brought, not by the legal entity to whom the money belongs, but by certain persons who allege that they are members, shareholders, or whatever they may be properly termed, of that legal entity, it is incumbent on them to show that as such shareholders they have an independent right of action against money which is the money of that legal entity. That they do not and have not attempted to show. In my opinion, therefore, the action is not brought within sub-r. (*g*) any more than it is within sub-r. (*f*). On all these grounds I think that the order of Russell J. is perfectly right and that the appeal must be dismissed.

SARGANT L.J. I am of the same opinion. I entertain very grave doubt whether this action is within the letter or the spirit of sub-r. (*f*) or sub-r. (*g*) of Order XI., r. 1. As regards sub-r. (*f*), I think that what is there contemplated is an action where an injunction is part of the substantive relief claimed. Of course the rights of the parties, speaking generally, are crystallized at the date of the writ, and the reason why they are not then ascertained is because it is impossible to give judgment immediately, various other steps necessarily have to be taken, other cases have priority.

But assuming that a judgment could have been given in this case at the date of the writ, it is quite clear that an injunction would not have been any part of the relief asked and would have been wholly and totally unnecessary. It seems to me that the claim on the writ for an injunction suggests that a fictitious importance was desired to be attributed to a part of the relief which was really only of a temporary character. With regard to sub-r. (*g*), here again there is a curious inversion. Undoubtedly, even if there was any right against Mr. Hilbery, the principal and primary defendant was M. Georges Caroly, and Mr. Hilbery was not more than a subordinate and secondary defendant. So that the terms of sub-r. (*g*) are precisely inverted here. You merely have Mr. Hilbery as a necessary or proper party to a claim properly brought against M. Georges Caroly, and therefore in my judgment the terms of sub-r. (*g*) of the rule are not satisfied.

Then passing from that and looking at the merits of the case and what is the forum conveniens, the matter is still clearer. A general administration is proceeding in Belgium of the whole of the assets of this société with a view to a distribution after payment of debts and liabilities amongst all the shareholders of the company. But here you have an attempt to obtain a separate administration of one particular asset of the company amongst some only of the shareholders of the company. It appears to me that nothing can be more inconvenient and more illogical than a claim of that kind. It is not a case where, as sometimes may happen, you have a subordinate liquidation in one country with a view of handing over the results to the principal liquidator in another country. It is really an attempt to obtain a mere partial administration, both as regards the assets administered and the persons between whom the results of the administration would be made over.

Appeal dismissed.

Solicitors for appellants: *William A. Crump & Son.*
Solicitors for respondents: *Henry Hilbery & Son.*

W. I. C.

C. A.
1925
Jan. 30:
Feb. 2, 19.

BERNERS *v.* FLEMING.

[1924. B. 715.]

Vendor and Purchaser—Specific Performance—Construction of Contract—Application for specific Performance of Contract according to a Construction held to be mistaken—Right to Specific Performance of Contract as construed by the Court—Defendant's Offer to complete—Withdrawal—Repudiation—Delay.

A vendor who claims specific performance of a written contract for sale and insists upon a wrong interpretation of the contract down to and at the trial, does not thereby forfeit his right to elect to have specific performance of the contract as rightly interpreted, the purchaser's offer, contained in his defence, to complete on those terms not having been withdrawn.

Preston v. *Luck* (1884) 27 Ch. D. 497 applied.

Decision of Russell J. on this point, ante, p. 39, reversed.

A party to a contract who desires to avail himself of an act of repudiation by the other party must evidence his election to do so with every reasonable dispatch.

Halkett v. *Earl of Dudley* [1907] 1 Ch. 590 and *Frost* v. *Knight* (1872) L. R. 7 Ex. 111 applied.

Accordingly, it is too late for a purchaser, who in his defence to an action by the vendor for specific performance has pleaded that he was willing to complete on the right interpretation of the contract, to seek at the trial to amend that offer and ask for rescission and recovery of his deposit, on the ground that the plaintiff by his conduct in insisting upon a wrong interpretation had repudiated the contract and had thereby given the defendant the option to accept that repudiation.

Decision of Russell J. on this point, ante, p. 39, approved.

Form of Order.

The following statement of facts is taken from the considered judgment of the Master of the Rolls :—

"This is an appeal from a judgment of Russell J. dated the 11th November, 1924. (1)

On the 3rd July, 1923, the plaintiff offered certain portions of his freehold estate, lying to the north of Oxford Street, for sale by auction, and the defendant became the purchaser of Lot 10. This lot comprised a warehouse and workshops situate in Perry's Place and Newman's Yard, which though contiguous, are intersected by a wall. There is access to the southern portion of Lot 10 from Oxford Street by a passage

(1) Ante, p. 39.

therefrom which leads into Perry's Place: while access to the northern portion of it is afforded by a passage way leading from Newman Street to Newman's Yard which abuts upon this northern portion. The whole of Lot 10 although physically divided was subject to one lease to a bank granted on the 30th October, 1918. The soil of Perry's Place was included at the auction sale in Lot 1, and the soil of Newman's Yard was included in the sale of Lot 9.

In the particulars and conditions of sale there is a note at the head of the particulars as follows: 'The purchasers of Lots 1, 3 and 10, will be granted an easement of a perpetual right of way over the roadway leading from Oxford Street to Perry's Place, subject to similar obligations to those which are set out in the leases under which the premises comprised in those Lots are now held'; and those words are agreed to cover and include the whole of the land coloured brown on the sale plan from Oxford Street leading through the narrower portion up to the square part of Perry's Place.

The particulars of Lot 1 include the even numbers 70–86 Oxford Street, and 'the freehold of the yard and passage way leading thereto known as Perry's Place, subject to the rights of way and other easements granted to the lessees and purchasers of Lots numbered 1, 3 and 10, and to a lease of a right of way over part of the roadway leading from Perry's Place up to the point marked on the plan attached—at the rental of 1*l.* per annum: The lessees under the grant of right of way pay an equal moiety of keeping the roadway in repair.'

At the head of Lot 4 there is another note. 'The purchasers of Lots 4 to 11 inclusive will be granted an easement of a perpetual right of way into Newman's Yard from Newman Street, subject to similar obligations to contribute to the repair of the gateway passage and yard to those contained in the leases under which the premises comprised in those Lots are now held.'

Lot 9 included the freehold of the yard, and roadway leading thereto known as Newman's Yard, Newman Street, W., subject to the rights of way and other easements granted to

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the lessees and purchasers of Lots 4–11 inclusive. This lot was purchased at the sale by a Mr. Horne. Lot 1 did not find a purchaser.

Among the conditions of sale was one numbered 14 which provided: 'Where any Lot appears by the particulars to be offered for sale subject to any easement or right for the benefit of any other Lot or Lots, the conveyance of both the servient Lot and the dominant Lot or Lots shall be framed accordingly, and in case of difference as to the nature or extent of any such easement or right or as to the form or mode of giving effect in the conveyance to any purchaser of any grant, reservation, or covenant, the same shall be determined by the vendor's solicitors.'

The title was accepted by the defendant, but difficulties arose as to the words to be used in granting to the defendant the rights of way which under his contract he was entitled to have. Mr. Horne, the purchaser of Lot 9, whose purchase included the freehold of Newman's Yard, was of course interested, and after a correspondence which lasted for four months from August to December 20th, 1923, the vendor's solicitors insisted that the purchaser must accept the form finally settled by them which was 'in perpetuity as the same are, or can be now used, and enjoyed under, or by virtue of the lease hereinafter referred to, but not further or otherwise,' and the letter of December 20th requested the purchaser's solicitors, 'to complete your client's purchase by the 1st January next and failing this, we shall complete the conveyance to Mr. Horne of Newman's Yard on that day, and also acting on our client's instructions, shall commence proceedings for specific performance of your client's contract.'

Now the difficulty was centred in the words 'as the same are or can be now used and enjoyed.' For, as stated at the outset of this judgment, Lot 10 was physically divided at the date of the purchase—the user of Perry's Place at that time was confined to the southern portion of Lot 10, abutting upon it, while the user of Newman's Yard was confined to the northern portion of Lot 10, abutting upon it. There was not then, and could not be, an interchange and reciprocity

of user between the two portions of Lot 10 over Perry's Place and Newman's Yard—a freedom which the purchaser not unnaturally desired to be able to exercise should the opportunity at any time arise for him to do so. Now the words in the two notes which I have set out above refer respectively to the Lots in question—in whole, and not in part. 'The purchaser of Lot 10 will be granted an easement of a perpetual right of way over the roadway leading from Oxford Street to Perry's Place.' Similarly: 'the purchaser of Lot 10 will be granted an easement of a perpetual right of way into Newman's Yard from Newman Street.'

There does not appear to be any justification for cutting down the clear terms of the notes applicable to each. I agree with the judgment expressed by Russell J. upon this point, as well as upon the construction and effect of condition 14, which was relied upon by the solicitors for the vendor in their correspondence, but which has not been pressed before this Court.

Now, however, comes the difficulty. The vendor commenced his action, as his solicitors had expressed their intention of doing in the letter of December 20th, on February 6th, 1924. By his statement of claim he asked for specific performance of the said agreement of purchase, asserting that he was entitled to specific performance in accordance with his interpretation of the notes to the conditions: that is, with separate rights of way attached to each portion of Lot 10 severally. The defendant by his defence claimed that he was entitled to have granted to him a right of way over Newman's Yard, and Perry's Place in respect of the whole of Lot 10.

The latter part of clause 10 of the defence ran as follows: 'The defendant offered and is still willing that the grant to him of the said rights of way shall be in the terms of the grant of rights of way contained in the said lease with such alterations as are necessary owing to the fact that the defendant is purchasing the freehold and is not being granted a lease."

Mr. Preston at the trial offered that the claim for specific

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performance should be modified so as to accord with the true construction of the contract as interpreted by the Court, and was willing to undertake to procure that Mr. Horne should execute any document necessary to that end and produced a letter from Mr. Horne showing his willingness thereto. This offer the learned judge held of no avail and he dismissed the action with costs, on the ground that the plaintiff's claim was greater than what the contract of sale gave him, and that he was not entitled to modify his claim at the trial even though he was ready to pay the costs of the action, an offer adhered to in this Court by Mr. Preston.

The defendant had brought a counterclaim for rescission of the agreement, if it were interpreted as asked by the plaintiff. As the learned judge decided against the plaintiff, he held that the counterclaim was unnecessary: that the condition on which it was put forward had not arisen, and he made no order upon it. At the same time he refused leave to the defendant to amend his offer pleaded in clause 10 of the defence, or to allow him to plead that the plaintiff by his conduct had repudiated the contract and so had offered the defendant the option to accept that repudiation, to rescind the contract and recover his deposit. The plaintiff appeals.

The appeal was heard on January 30 and February 2, 1925.

Preston K.C. and *W. A. Peck* for the appellant. The vendor never repudiated this contract. He put a wrong interpretation upon the conditions of sale, but when that interpretation did not meet with the approval of the Court at the trial, he elected to accept specific performance of the contract according to the purchaser's interpretation and submitted to pay the costs of the action. The mere fact that the vendor put an erroneous construction on the contract is no ground for saying there was no contract, or for imputing to him repudiation of the contract, or for refusing him specific performance according to the purchaser's construction: *Preston* v. *Luck*. (1) Nothing had happened to show that the purchaser was not willing to complete the purchase according

(1) 27 Ch. D. 497.

to his own view of the contract. The appellant abandons his appeal upon the question of the construction of the contract, and now only asks for specific performance according to the interpretation which the Court has put upon it. At the time of the trial the appellants had obtained a written undertaking from Horne to grant such rights of way to the respondent as the Court should hold him entitled to, so that there can be no valid objection on that ground.

Bennett K.C. and *G. M. Simmonds* for the respondent. The appellant has repudiated this contract, both by his pleadings and by his conduct in conveying Lot 9 to Horne, and so putting it out of his power to convey to the respondent what he had contracted to buy. This latter ground of repudiation was not pleaded, because it was not discovered until the trial. When the appellant, just before judgment was delivered in the Court below, made his offer to complete, the respondent was not then willing and ready to complete, as the position had altered to his detriment, for he had lost the rents and was liable for interest: Fry on Specific Performance, 6th ed., para. 922.

Preston K.C. in reply. With Horne's concurrence, which can be procured, the respondent will get all that he wants. There has been no wilful default on the part of the vendor, and he should have interest on the purchase money: *North* v. *Percival* (1); *Bennett* v. *Stone* (2), as from the day fixed for completion.

Cur. adv. vult.

Feb. 19. POLLOCK M.R. [stated the facts as above set out, and continued:] First let me say that in my judgment the learned judge was right in refusing to allow the defendant to amend and plead repudiation by the plaintiff and the defendant's acceptance of it. Apart from the difficulty that such a plea would be remote from the facts, the defendant is not entitled to raise it at this stage of the proceedings. This is clear from the decision of Parker J. in *Halkett* v. *Earl of Dudley* (3), where he says: "It is in my opinion equally

(1) [1898] 2 Ch. 128. (2) [1903] 1 Ch. 509.
(3) [1907] 1 Ch. 590, 597.

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clear that this right of repudiation, whatever be its true nature, must be exercised, if it is to be exercised at all, as soon as the defect is ascertained." In the present case, there was no indication on the part of the defendant that he treated the plaintiff's conduct as equivalent to renunciation or as affording him the opportunity of electing to treat it as such. The defendant adhered to the contract and pleaded that, properly interpreted, he was ready and willing to fulfil it. "In that case he keeps the contract alive for the benefit of the other party as well as his own": see *Frost* v. *Knight* (1) and *Johnstone* v. *Milling*. (2)

Next, can the plaintiff be granted specific performance, even though he has required the purchaser to accept a conveyance in a form which the Court holds was not in accordance with the contract? There is no question here of mistake, or want of mutuality. The difficulty that has arisen is only as to the interpretation to be given to the particulars and conditions. "The mere fact that they put an erroneous construction on a contract in writing existing between them and the defendant Luck, and insisted that it included what it does not in fact include, is, in my opinion, no ground for saying there is no contract": see per Cotton L.J. in *Preston* v. *Luck*. (3)

No case has been cited to the Court where it has been decided that where the plaintiff put a wrong interpretation upon the contract he thereby forfeits his claim to specific performance of the contract as rightly interpreted, if he is willing so to modify it. There are, however, a number of cases which point in the opposite direction. Thus in *Fife* v. *Clayton* (4) Lord Eldon decreed specific performance where the plaintiff offered to perform the agreement as found at the trial; and in *Gwynn* v. *Lethbridge* (5) the decree for specific performance of a contract according to the contention of the answer was upheld by the same Lord Chancellor. In *Martin* v. *Pycroft* (6) Knight Bruce L.J. granted specific

(1) L. R. 7 Ex. 111, 112.
(2) (1886) 16 Q. B. D. 460.
(3) 27 Ch. D. 497, 507.
(4) (1807) 13 Ves. 546.
(5) (1808) 14 Ves. 585.
(6) (1852) 2 D. M. & G. 785, 794.

performance to a plaintiff, "because he was willing, and submits that the agreement may be construed, and shall be performed according to the true and real bargain." Specific performance of a contract was decreed by Lord Cottenham, even though it was discovered in the course of the trial that a parol variation or addition to it had been made (which was not set up by the answer), where the plaintiff accepted the position thus created: see *London and Birmingham Ry. Co.* v. *Winter*. (1) This case was referred to by Fry J. in *Smith* v. *Wheatcroft* (2) as embodying the true rule. The question is one of degree and discretion. Where it is found that the parties are not ad idem the Court declines to interfere, but where the parties were at one the Court may grant specific performance, even if a variation or addition must be made.

The present case, where the question is one of interpretation, seems a fortiori from the above. In the present day, when the Court is equipped to give the relief required in the circumstances, it seems quite unnecessary to require the plaintiff to bring a fresh action, as it is admitted he could do. Nor can the defendant require this to be done in order to enable him to alter his position. The defendant has stood by his contract, even to the exclusion of his conditional counterclaim for rescission, if only his interpretation of the contract is accepted by the Court. It is too late for him, in a new action, to ask for rescission of the contract, which has been found to stand good according to the defendant's own interpretation in the present action.

For these reasons, I am of opinion that the plaintiff will be entitled to specific performance on the basis of his paying the costs of the action, a term offered below which he stands by in this Court. The appeal must be allowed.

Sargant L.J. has been good enough to draw up the terms of the order which will be made.

SARGANT L.J. The facts in this action have been very clearly stated by the learned judge in his judgment and it is unnecessary to recapitulate them. Further, the appellant

(1) (1840) Cr. & Ph. 57. (2) (1878) 9 Ch. D. 223.

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does not in any way question the findings of the judge as to the true construction of the agreement between the parties—namely, that the defendant was right in claiming to have conveyed to him a right of way in respect of the whole of Lot 10, both over Perry's Place into Oxford Street and over Newman's Yard into Newman Street, and also that the difference on this point which had arisen between the appellant and Horne on the one hand, and the respondent on the other hand, was not one which could be determined by the appellant's solicitors. It is also conceded on the part of the appellant that the judge was fully entitled to order the costs of the respondent up to and including the hearing to be paid by the appellant, as the party who had occasioned the litigation by insisting on what has been decided to be a wrong interpretation of the contract. That which the appellant complains of is the dismissal of his claim for specific performance. He maintains that he is still entitled to specific performance of the contract in accordance with the interpretation which has been placed upon it by the Court, so as to leave him an opportunity of showing a good title in accordance with that interpretation. The question is one of some general importance and on which there is little, if any, express authority. It depends both on general principle and on a consideration of the attitude of the parties as evinced by their pleadings in the action.

The view of Russell J. on this part of the case is very clearly and vigorously expressed in the following passage from his judgment. He said (1): "The action is one for specific performance not of the contract as now construed by the Court, but of a totally different contract. The action was based, and necessarily based, on the allegation that the plaintiff was at all times and is now willing to carry out the contract. That is quite true with regard to the contract as construed by the plaintiff, but quite untrue with regard to the contract as construed by the Court; for the present purpose I must assume the Court's construction to be correct. Mr. Preston says: 'True it is that I have sought up to the

(1) Ante, p. 43.

present moment to force upon the defendant a contract which I am not entitled to force on him, and that I have resisted with all my power performing the contract which the defendant, and now the Court, say is the correct one; but still you must not dismiss my action for specific performance. I am entitled at the last moment to turn round and say: Having blown hot, I now blow cold. I now ask the Court to decree specific performance of the contract which the Court has determined to be the true contract.' No authority has been cited to me in favour of that contention, and in the absence of any clear and binding authority it does not seem to me to be a reasonable position. The action will be dismissed with costs."

Now with all deference to the learned judge, I am unable to take this view of the matter. The only contract that the plaintiff has throughout been endeavouring to enforce is the written contract which confessedly was made between him and the defendant. And though the plaintiff has unfortunately put a construction on the contract which was a mistaken one and has failed, I cannot see that he has thereby disentitled himself to enforce the contract on that construction of it which the Court has determined to be the right one. No doubt he has insisted on his mistaken view down to and at the hearing; but that was the first time at which the true construction of the contract was or could be ascertained by the Court in these proceedings. And when there is, as here, a perfectly bona fide dispute as to the interpretation of conditions of sale by auction, it is I think an unduly strict view to take of the position of a vendor, that he cannot seek to enforce his view of the written contract without losing his right of enforcing it at all, should his interpretation prove to be incorrect.

Nor do I think that the particular pleadings in this action have put the plaintiff out of Court. No doubt various paragraphs in the statement of claim indicate the construction of the contract for which he is contending. But his actual prayer is for "specific performance of the said agreement," which undoubtedly means the contract in writing stated in

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para. 2 of the statement of claim. And this view is accepted by the defence, which does not question the existence of this contract in writing, and by para. 10 makes an offer (which of course must be read as subsisting down to the hearing: see *Hipgrave* v. *Case* (1)), to accept a grant of rights of way in the sense contended for by the defendant. From the time of the delivery of that defence, I think that the sole effective question between the plaintiff and the defendant on the plaintiff's claim was, whether these rights of way were to be granted in respect of the whole of Lot 10 or in respect of the two separate portions thereof respectively.

The learned judge suffered from little if any authority being cited to him in support of the contentions of either party; and we in this Court have been almost equally unfortunate, though Mr. Preston did refer to one case: *Preston* v. *Luck* (2), which is of considerable assistance in his favour. But there are other cases, such as *London and Birmingham Ry. Co.* v. *Winter* (3) and *Smith* v. *Wheatcroft* (4), which also tend definitely in the same direction. I have not found any case where, there being a single definite written contract readily capable of interpretation by the Court, and no question arising of the existence of any parol variation or of any misleading of the defendant, the plaintiff has been held to have forfeited his right to specific performance by reason of his having sought to enforce a mistaken interpretation of the contract. *Clowes* v. *Higginson* (5), which was a sequel to *Higginson* v. *Clowes* (6), with the position of the parties reversed, was a case in which there was an extraordinarily ambiguous agreement, and the Court held that there had been a mistake on both sides as to a most important term (namely, the inclusion or exclusion of valuable timber), and that the parties were never ad idem. And in *Marshall* v. *Berridge* (7) the circumstances were so exceptional as to form no precedent of any value in the present case. In *Lindsay* v.

(1) (1885) 28 Ch. D. 356, 361.
(2) 27 Ch. D. 497.
(3) Cr. & Ph. 57.
(4) 9 Ch. D. 223.
(5) (1813) 1 V. & B. 524.
(6) (1808) 15 Ves. 516.
(7) (1881) 19 Ch. D. 233.

Lynch (1) a bill by an intending lessee for specific performance of an agreement for a lease for three lives was dismissed without prejudice to his filing another bill for a lease for a single life. But in that case there was beyond the written agreement a superadded parol variation which was in dispute. And I do not think that at the present day it would be right to dismiss the plaintiff's action without prejudice to his being at liberty to bring another action to enforce the contract as now construed by the Court, if the Court were of opinion (as I think it should be here) that the conduct of the plaintiff had not definitely precluded him from obtaining specific performance. Nor does the formal order as actually drawn up here contain any such special reservation in the plaintiff's favour; and as it stands it would in my judgment be a formidable obstacle, if not a complete bar, to success in any subsequent action for specific performance.

But the respondent in his argument before this Court has gone even further than the learned judge, and has contended that the pleading of the appellant has amounted to an actual repudiation of the contract, and entitled the respondent at the hearing to accept this repudiation and to obtain a declaration that the contract had been rescinded. I cannot think that this attitude is well founded so far as the claim (as distinguished from the counterclaim) is concerned. The reasons for holding that the mistake of the appellant as to the true construction of the contract do not preclude him from enforcing the contract as properly construed, apply with at least equal force to negative the conclusion that the appellant's attitude amounted to a repudiation of the contract. And, further, it is essential that a party to a contract, who desires to avail himself of an act of repudiation by the other party, should evidence his election to do so with every reasonable dispatch: *Halkett* v. *Earl of Dudley*. (2) But here, on the contrary, from the time of the delivery of the defence down to the hearing of the action, the respondent, so far from availing himself of what is now relied on as a repudiation by the appellant, professed his willingness to complete the

(1) (1804) 2 Sch. & Lef. 1. (2) [1907] 1 Ch. 590, 597.

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contract if (as has now proved to be the case) the contract should be construed in the sense contended for by him.

Further, though the respondent by his counterclaim asked for the rescission of the contract, this was only sought conditionally and on a hypothesis which has not been fulfilled—namely, that the contract should be interpreted according to the appellant's contentions. As to this counterclaim the learned judge was in my opinion quite right in refusing the respondent liberty to amend, so as to raise an entirely new and unconditional claim for rescission. And no cross appeal has been lodged by the respondent against this refusal or against the dismissal of the counterclaim.

One further argument on the part of the respondent remains to be considered—namely, that by the conveyance to Horne of the freehold of Newman's Yard, the precise terms of which deed were not known to the respondent until the hearing of the action, the appellant deliberately put it out of his power to grant to the respondent a right of way over Newman's Yard to the whole of Lot 10; and that the appellant by so doing repudiated his contract with the respondent and gave him a fresh right of electing to treat the contract as at an end. There is in my judgment a sufficient answer to this argument. In the first place, I have grave doubts whether the conveyance to Horne had this effect—that is, whether the subjection of Newman's Yard in that deed to "the rights of way and other easements granted to the lessees and purchasers of Nos. 4, 5, 6, 7, 8, 9 Newman Street and the warehouse and workshops in Perry's Place and Newman's Yard" (that is, Lot 10) did not subject Newman's Yard to the easements provided for by the particulars and conditions of sale on their true construction. Having regard to the offer made by the appellant both to the judge below and to this Court, we ought not to decide the point against the respondent, but should require the appellant to obtain a regrant from Horne to the appellant sufficient to enable the appellant to give the respondent a full and undoubted title to a right of way over Newman's Yard to the whole of Lot 10. But, assuming that the grant to Horne prevented the

appellant from granting the respondent the right of way contracted for, I do not think that the mistake was without excuse or that if and when remedied it should thereafter stand in the way of the appellant. The appellant had to complete his contract with Horne, and could not well put him off until the difference with the respondent was determined, the owners of Lots 4 to 9 inclusive also having rights in the matter. And I cannot therefore regard the conveyance to Horne as being of the nature of a repudiation of the bargain with the respondent. Further, this right of way to the whole of Lot 10 was after all only an adjunct to the main subject of the sale—namely, the warehouses and workshops forming Lot 10. And a defect in title to a comparatively small part of the subject matter of the contract is capable of being cured before conveyance, and is the sort of defect for the cure of which the Court usually allows a reasonable time: *Coffin* v. *Cooper* (1); *Chamberlain* v. *Lee.* (2)

The delay in the completion of the matter having been caused by the clear though bona fide mistake of the appellant as to the terms of the conveyance to the respondent, and the Court having full discretion as to the terms on which specific performance should be decreed, it should in my opinion be a term of granting relief in this case to the appellant, that the respondent should pay interest on the balance of his purchase money on completion not at the full rate of 6 per cent. reserved by the agreement, but at the lower rate of 5 per cent. only.

In my view the judgment of the Court should be in the following terms:—

Discharge the order of November 11, 1924, except so far as it directs that the costs of the action be taxed by the taxing Master and paid by the plaintiff to the defendant. Declare that on the true construction of the contract of July 3, 1923, in the pleadings mentioned the defendant was entitled to the grant of a perpetual right of way to and from the whole of Lot 10 over the roadway leading from Oxford Street to Perry's Place, and also to the grant of a perpetual

(1) (1807) 14 Ves. 205. (2) (1840) 10 Sim. 444.

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right of way to and from the whole of Lot 10 over the access by way of Newman's Yard from and to Newman Street.

And it appearing that the title to Lot 10, except as regards the power to grant the said right of way to and from Newman Street, has been accepted by the defendant, and that the form of the conveyance of Lot 10, except as regards the grant of the two rights of way, has been agreed between the parties, Order that upon the plaintiff executing to the defendant a conveyance of Lot 10 in the said agreed form with such variation as is necessary to convey the said two rights of way (such variations to be settled by the judge in case the parties differ) the defendant do complete the said purchase on his part in accordance with the said contract, but so that upon completion the defendant is charged with interest on the balance of his purchase money at the rate of 5 per cent. per annum only instead of 6 per cent.

Liberty to either party to apply to the judge in chambers as to the title of the appellant to grant the rights of way hereinbefore specified or on any other question arising on the completion of the purchase as hereinbefore decreed and generally.

Order the defendant to pay to the plaintiff his costs of the appeal, such costs to be taxed, and let the costs payable under this order be set off against the costs payable by the plaintiff to the defendant under the order of November 11, 1924.

ASTBURY J. This is an appeal by the plaintiff, in a vendor's specific performance action, in which the whole expense of the litigation in the Court below was caused solely by the vendor attempting to force upon the purchaser a conveyance which did not give him the rights which by the contract in question he was entitled to.

If the purchaser had obtained from the vendor, as possibly he might have done, a refusal to complete, except upon the terms wrongfully insisted upon by him, and had by his defence or otherwise accepted this position, and asked to be relieved from his contract by reason of such repudiation of

his rights by the vendor, I am of opinion that the action would have been rightly dismissed. This, however, is not what the purchaser did. The statement of claim asked for specific performance of the contract existing between the parties, setting up, however, a construction of the agreement which the vendor was not entitled to insist upon, and wrongfully alleging that the plaintiff was and always had been ready and willing to perform the contract, and that the non-completion thereof was solely due to the wilful neglect and default of the purchaser, which was not the fact. The defence put those allegations in issue, but para. 10 contained an offer by the defendant to complete upon the true construction of the contract, which was rightly pleaded by him, and the action went to trial with this offer on the part of the defendant remaining in the pleadings.

Towards the end of the hearing in the Court below, the plaintiff's counsel in his reply, aware that the Court was against the construction of the contract theretofore contended for by his client, offered to complete upon the construction contended for by the defendant and to pay the costs of the action down to and including an order for specific performance to be made in the action. This in my judgment was an acceptance of the offer contained in the defence to complete on the terms contained in it, so that, at this moment, both parties to the action, which was for specific performance, must be taken to have them submitted to perform the contract, by which they were both bound, in accordance with the true construction of its terms, which the defendant had throughout rightly contended for; in my opinion the plaintiff's belated repentance on the question of construction was, subject to costs, in time; the defendant, who was protected in the matter of costs, had no right to complain of being confirmed in his purchase on the true terms of his contract and his offer so to complete it; and an order for specific performance would have been the appropriate ending to the action, which was properly constituted and available for this purpose.

The defendant's subsequent attempt to obtain leave to amend his conditional counterclaim and to set up a prior

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unpleaded acceptance of an alleged repudiation of the contract by the vendor at an earlier date, as to the existence of which under the circumstances I am by no means satisfied, was in my judgment too late, and was properly refused.

At the time when the plaintiff's counsel offered to complete the agreement on its true construction both parties were or must be taken to have been, as I have said, willing and offering to complete their existing contract, as in law they ought to have been, and this seems to me to end the matter.

I have had the privilege of reading the judgments delivered by my Lord and Sargant L.J. and I agree with them, and with the form of order proposed to be made in this Court.

Solicitors for appellant: *Saxton & Morgan.*
Solicitors for respondent: *Rivers & Milne.*

R. M.

EVE J. 1924 *Oct.* 22, 23. 1925 *Feb.* 10.

In re EXMOUTH'S ANNUITY.

[1892. E. 764.]

Revenue—Estate Duty—Assessment—Aggregation—Annuity granted by Act of Parliament and rendered inalienable—Redemption—Sum of Consols in Court—"Chattels"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 4, 5, *sub-s.* 5.

By the Finance Act, 1894, s. 5, sub-s. 5: "Where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the provisions of this Act with respect to settled property shall not apply, and the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued, for the purpose of estate duty, in like manner as for the purpose of succession duty."

By an Act of 54 Geo. 3 an annuity of 2000*l.* was inalienably settled on Lord E. and his successors in title. In 1892 the redemption of the annuity for a sum of 55,890*l.* was agreed upon, and that amount was paid into Court and invested in the purchase of Consols. The fifth Viscount E. died in August, 1922, and the sixth Viscount in February, 1923. Questions having arisen as to the payment of estate duty, the Court was asked whether estate duty became payable (*a*) upon

the capital of the sum of Consols, or (*b*) upon the value of the interest of the successor to the title in such sum of Consols, and if estate duty became so payable, then whether, for the purpose of determining the rate of estate duty, such sum of Consols ought (*a*) to be aggregated with the other property, or (*b*) to be treated as an estate by itself:—

Held, that "chattels" in collocation with settled lands in sub-s. 5 did not suggest personalty generally, but those particular items of it which were usually settled upon trusts that followed the devolution of the settled land, and that, therefore, the sum of Consols was not "chattels" within the meaning of the sub-section, and must be aggregated with the other property for the purpose of paying estate duty.

BY an Act of 54 Geo. 3, c. 164, entitled "An Act for settling and securing an annuity on Lord Exmouth, and the persons to whom the title of Lord Exmouth shall descend, in consideration of his eminent services," it was enacted that an annuity of 2000*l.* should be payable out of and be charged on the Consolidated Fund of Great Britain in favour of Lord Exmouth for and during his natural life, and from and after his decease to his succeeding heirs male on whom the title, honour, and dignity of Lord Exmouth should descend for and during their natural lives, and it was further provided that the annuity should not at any time thereafter be aliened, conveyed, disposed of, charged, or incumbered by Lord Exmouth, or by any of the succeeding heirs male of his body on whom the title should descend, for any greater or larger estate or time, than during the life of the possessor, so as to prevent the same from descending to the next or succeeding heir to whom the title of Lord Exmouth should descend.

By an agreement dated June 24, 1892, the redemption of the annuity was agreed upon under the provisions of the Consolidated Fund (Permanent Charges Redemption) Act, 1873 (36 & 37 Vict. c. 57), and by an order made by Kekewich J. on July 4, 1892, confirming the agreement, the sum of 55,890*l.*, the consideration money, was paid into Court, and was invested in the purchase of 55,558*l.* 17*s.* 2*d.* New Consols. By an order dated October 7, 1892, it was ordered that the interest on such New Consols should be paid to the then Viscount Exmouth during his life. On the death of the fourth Viscount Exmouth an order dated February 20, 1902, was made that sufficient Consols should be sold to raise the amount necessary to pay

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the estate duty and costs, and in pursuance thereof 3687*l.* 18*s.* 1*d.* Consols were sold, leaving 51,870*l.* 19*s.* 1*d.* in Court. The fifth Viscount Exmouth died on August 17, 1922, and the sixth Viscount on February 4, 1923.

Questions having arisen as to how estate duty was payable, this application was made by the present Viscount Exmouth and the executor of the will of the fifth Viscount, asking that it might be determined whether upon the deaths of the fifth Viscount and the sixth Viscount respectively, estate duty became payable (*a*) upon the capital of the 51,870*l.* 19*s.* 1*d.* Consols, or (*b*) upon the value of the interest of the successor in title in such sum of Consols. If estate duty became so payable, then whether, for the purpose of determining the rate of estate duty to be paid on the property passing on the deaths of the fifth Viscount and the sixth Viscount respectively, such sum of Consols ought (*a*) to be aggregated with the other property passing on such deaths respectively, or (*b*) to be treated as an estate by itself.

Bryan Farrer for the applicants. The question to be determined is whether this case comes within the meaning of s. 5, sub-s. 5, of the Finance Act, 1894, in that the sum of Consols can be held to be inalienably settled chattels, and not personal property within ss. 1 and 2 of the same Act. The original annuity was clearly inalienably settled by the Act of 54 Geo. 3, and the redemption moneys were similarly inalienable. These moneys were also "chattels" within the meaning of s. 5, sub-s. 5, of the Act of 1894, and came within the decision of *Nevill* v. *Inland Revenue Commissioners.* (1) Therefore there can be no aggregation of this sum of Consols with the other property passing on the deaths of the fifth and sixth Viscounts. It should be treated as an estate by itself. The Act of 1894 is a Taxing Act, and therefore must be construed strictly. The sub-section was framed to relieve inalienable settled property of what would be an intolerable burden. "Chattels" is a word wide enough to include money and investments, and that is shown by the decision

(1) [1924] A. C. 385.

in *In re Bolton Estates Act*, 1863 (1), that estate duty payable under sub-s. 5 is payable out of income, and by the use of the word "corpus" in s. 44 of the Finance Act, 1922 (12 & 13 Geo. 5, c. 17). If "chattels" does not include money and investments, then money settled by Act of Parliament upon trust to be laid out in the purchase of land would not, until investment, come within the sub-section. Lord Blackburn in *Colonial Bank* v. *Whinney* (2) states that shares in a railway company are personal chattels, and Lord Field in *Commissioner of Stamps* v. *Hope* (3) takes the view that a debt is per se a chattel. The words "in possession" in sub-s. 5 cannot mean in physical possession of the lands and chattels, but only legally entitled to them. If there is any doubt as to whether this sum of Consols comes within the sub-section, the Court should give the subject the benefit of the doubt.

J. E. Harman for the Crown. This case does not come within sub-s. 5. This sum of Consols is not "settled property" within the meaning of the definition in s. 22 of the Act of 1894. If it does not come within sub-s. 5, then *In re Bolton Estates Act*, 1863 (1), has nothing to do with it, and the duty is payable out of capital money. Land and chattels must mean something less than real and personal property. The collocation of the words denotes that "chattels" must mean something that goes with the land. The tenant for life is not in possession of settled property; the trustees are. It is only a chose in action that a successor gets. Sir William Grant M.R. deals with what is interest on stock in *Wildman* v. *Wildman*. (4) Lord Cairns states the principle in *Partington* v. *Attorney-General* (5) that if a person sought to be taxed comes within the law he must be taxed, however great the hardship may appear to be. This sum of Consols must be aggregated with the rest of the estate.

Dighton Pollock for the Lords Commissioners of the Treasury.

(1) [1904] 2 Ch. 289.
(2) (1886) 11 App. Cas. 426, 434, 438.
(3) [1891] A. C. 476, 481.
(4) (1803) 9 Ves. 174, 177.
(5) (1869) L. R. 4 H. L. 100, 122.

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Farrer in reply. The Court is bound by the letter of the law, and it says that " chattels " includes investments.

Cur. adv. vult.

1925. Feb. 10. EVE J. By sub-s. 5 of s. 5 of the Finance Act, 1894, it is enacted that where any lands or chattels are so settled, whether by Act of Parliament or royal grant, that no one of the persons successively in possession thereof is capable of alienating the same, whether his interest is in law a tenancy for life or a tenancy in tail, the property passing on the death of any person in possession of the lands and chattels shall be the interest of his successor in the lands and chattels, and such interest shall be valued for the purpose of estate duty in like manner as for the purpose of succession duty.

In *Nevill* v. *Inland Revenue Commissioners* (1) the House of Lords held that by virtue of this section estate duty on the lands or chattels therein dealt with is to be levied only on the value of the interest of the successor, and that such interest is not to be aggregated with the other property passing on the death of the person in possession but is to be treated as an estate by itself.

The question I have to determine is whether a sum of Consols standing in Court to the credit of the account in which the summons is intituled can properly be held to be inalienable settled chattels within the sub-section.

The fund represents what is left of a sum of 55,890*l.* paid by the Treasury under a contract of June 24, 1892, for the redemption of an annuity of 2000*l.* by an Act passed in the fifty-fourth year of the reign of King George III., c. 164, directed to be paid to Vice-Admiral Edward Lord Exmouth for his natural life and from and after his decease to the succeeding heirs male of the body of the said Lord Exmouth upon whom the title, honour and dignity of Lord Exmouth should descend for and during their natural lives. By s. 6 of the Act the annuity was made inalienable for any longer term than the life of the possessor.

(1) [1924] A. C. 385.

The contract of June, 1892, was entered into under the powers conferred by the Consolidated Fund (Permanent Charges Redemption) Act, 1873, and was assented to by an order of this Court dated July 4, 1892, whereby it was ordered that the Commissioners of Her Majesty's Treasury were to be at liberty on or before the 25th of the same month to lodge in Court the purchase money which was thereupon directed to be invested in Consols. Under subsequent orders the accruing interest has been paid to the successive holders of the title during their respective lives.

The recent deaths of the fifth and sixth Viscounts within a very short space of time have raised in an acute form the question whether the fund in Court ought to be treated for estate duty purposes as personal property within ss. 1 and 4 of the Act of 1894, or whether the mitigating provisions of s. 5, sub-s. 5, can be applied to it. In order that they may be so applied, it is necessary to establish that the fund is inalienably settled by one of the alternative methods mentioned in the section and is "chattels," and I think also it must be shown that the successive recipients of the income are persons who can properly be described as being in possession of the chattels.

In my opinion the original annuity was inalienably settled by the Act creating it and the same attributes attached to the redemption moneys, but I cannot bring myself to hold that these moneys are chattels within the meaning of that word in the sub-section. No doubt "chattels" is a word of wide signification and in certain circumstances has been held to cover every sort of personal property, including money, choses in action, and the whole of a testator's residuary personalty; but this very elasticity of meaning demands a close scrutiny of the context in which the word is used before its true meaning can be satisfactorily determined.

Now in this sub-section it cannot, I think, have been intended to exclude from aggregation under s. 4 all personalty capable of being included in the word "chattels," if settled in manner therein stated; otherwise one would have expected to find some such expression as "where any property real or personal

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is so settled" in the place of the words "where any lands or chattels are so settled." It follows that some restriction must be imposed on the word "chattels," and surely in collocation with settled lands settled chattels conveys a very definite meaning. It does not suggest personalty generally but those particular items of it which are usually settled upon trusts that follow as far as may be the devolution of the settled land, in other words, heirlooms. It appears that there are in existence certain chattels—pictures and plate—of the nature of heirlooms inalienably settled by statute to which therefore the special modification contained in the sub-section is applicable, and in these circumstances it is not necessary to cast about for an explanation of the language employed. In my opinion that language cannot properly be construed as contended for by the applicants.

This conclusion renders it unnecessary to determine the further point whether—assuming the fund to be chattels within the meaning of the sub-section—any of the successive tenants for life could be said to be in possession thereof. As at present advised I think it would be difficult to establish that the receipt of the income amounted to possession of the fund producing that income.

The result is that in my opinion aggregation is not excluded on the death of a tenant for life.

Solicitors: *Nicholl, Manisty & Co.; The Solicitor of Inland Revenue; The Treasury Solicitor.*

P. J. B.

ROMER J.

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Jan. 15, 16; *Feb.* 4.

In re HARDYMAN.

TEESDALE *v.* McCLINTOCK.

[1924. H. 3636.]

Will—Codicil—Republication—Meaning of "Wife."

A testatrix, by her will made in 1898, bequeathed a legacy of 5000*l.* "in trust for my cousin his children and his wife failing his children upon his death and that of his wife or until she marries again the said sum of five thousand pounds to be divided" in manner therein mentioned. The cousin of the testatrix was, at the date of the will, married to his first wife and she died in January, 1901. In November, 1901, the testatrix, with knowledge of the death of her cousin's first wife, made a codicil to her will, in which she made a bequest of a sum of stock and appointed a residuary legatee. The codicil contained no reference to the bequest of 5000*l.* In 1903 the cousin of the testatrix remarried. He died in 1924. There was no issue of either marriage. This summons raised the question whether the second wife was entitled to benefit under the bequest of 5000*l.*:—

Held, that the will and codicil must be read together, and that the second wife was entitled to an interest in the 5000*l.* for her life or until remarriage.

ADJOURNED SUMMONS.

The following statement of the facts is taken from his Lordship's judgment. The testatrix by her will, dated February 25, 1898, amongst other legacies gave a legacy of 5000*l.*, which she directed to be held "in trust for my cousin Colonel William Graham Waugh McClintock his children and his wife failing his children upon his death and that of his wife or until she marries again the said sum of five thousand pounds to be divided between" certain other persons. At the date of the will Colonel McClintock had a wife living, but she died in the lifetime of the testatrix—namely, on January 23, 1901. There seems to be some reason for supposing that the testatrix was actually staying with Colonel McClintock at the time when his wife died. Certain it is that, after his wife's death he came and resided with her, and there can be no question whatsoever but that she was well aware of the death of Colonel McClintock's wife. With that knowledge, on November 5, 1901, she made a codicil in these terms:

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"This is the codicil of me Charlotte Jeannette Hardyman" —describing herself—"to the said will bearing date of February the 25th, 1898. I give and bequeath after the death of my sister" (whom she describes) a certain sum of stock. She does not otherwise refer to her will except that she appoints her sister, whom she has mentioned in the codicil, her residuary legatee. After the death of the testatrix, which occurred on December 1, 1901, Colonel McClintock married again; that was in the month of January, 1903. He died in 1924, leaving no issue, and the question which I have to determine is whether his second wife is entitled to take under the gift in the will of 5000*l.* "in trust for my cousin Colonel William Graham Waugh McClintock his children and his wife."

Hodge for the summons.

Dighton Pollock for the second wife of Colonel McClintock. The testatrix by this codicil republished her will and brought it down to the date of the codicil. The death of the first wife of Colonel McClintock was clearly known to the testatrix at the date of the codicil. If the second wife can fill the character of "wife," under the terms of the will, she can take an interest in the 5000*l.* during her life or until remarriage. Where there is no wife living at the date of the will and codicil taken together, the interest vests in the first woman who answers the description of wife: *Radford* v. *Willis* (1); Jarman on Wills, 6th ed., vol. i., p. 398. The earlier cases dealing with republication are considered in *In re Smith.* (2)

Swords for the remaining defendants, who claimed to be interested in the 5000*l.* on the death or remarriage of the wife of Colonel McClintock. Although it is conceded that the will was republished by the codicil, the will cannot be treated as made for the first time at the date of the codicil. The English authorities are reviewed in *In re Moore.* (3) Republication does not for all purposes bring the will down to the date of the codicil. The date of the will

(1) (1871) L. R. 7 Ch. 7. (2) (1890) 45 Ch. D. 632.
(3) [1907] 1 I. R. 315, 318.

and the facts in existence at that time must be looked at. The testatrix has, in effect, designated a named person, and the wife referred to must be the wife at that time. Eve J., in an unreported case, recently adopted the view that a will must not necessarily be construed for all purposes as though it had been made at the date of the codicil. Effect must be given to the republication of the will as incorporated in the codicil. The date of the will, however, and the circumstances existing at that date cannot be disregarded, and the person referred to must be the person referred to at the date of the will. The codicil, therefore, does not have the effect of extending the meaning of the word " wife " in the will to a person not referred to in the will.

Dighton Pollock in reply. If that is the effect of the codicil the republication of the will becomes stultified. Republication must not be altogether disregarded. The contention on behalf of the second wife is supported by various authorities: *Barnes* v. *Crowe* (1); Theobald on Wills, 7th ed., p. 65.

ROMER J. stated the facts above set out, and continued: Now, it has been decided that where a testator bequeaths a legacy to the wife of a named person eo nomine, and there is a wife living at the date of the will, that wife, and no other person, can take under the bequest. One sees every reason why that should be so; but that has been extended, by authorities binding upon me, to cases where a benefit has not only been given to the " wife " of a named person, but where a benefit is given to a class, consisting of a named person, " his wife, and his children," whether in succession or together. Even in that case it has been held that if there be a wife of the named person living at the date of the will, that wife takes, and no other—a curious result, because no one will ever dispute, or could dispute, that the children of the named person, whenever born and by any wife, would take under the gift. However, there it is. If, therefore, the testatrix had died without having made a codicil, there can

(1) (1792) 1 Ves. Jun. 486.

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be no question, having regard to the state of the authorities, but that the second wife of Colonel McClintock, whom he married, as I say, after the death of the testatrix, would not have taken. It is, however, admitted that the effect of the codicil is to republish the will; it is a republication of the will as at the date of the codicil, and the effect of such a republication has been considered in several cases which have been cited to me. In *In re Fraser* (1), which is a decision of the Court of Appeal, such a question had to be considered, and in the judgment of the Court, delivered by Stirling L.J., the effect of republication is described in these words: "The effect of this"—that is, confirmation by a codicil of a previous will—"is to bring the will down to the date of the codicil, and effect the same disposition of the testator's estate as if the testator had at that date made a new will, containing the same dispositions as the original will, but with the alterations introduced by the various codicils." In accordance with that principle, recognized by the Court of Appeal in *In re Fraser* (1), it had been held in an old case of *Barnes* v. *Crowe* (2), decided before the Wills Act, that the effect of the republication of a will was to include within the devise of real estate contained in the will, land acquired after the date of the will. In *In re Champion* (3) the principle was again applied by North J. and the Court of Appeal. In that case a testator by a will made in April, 1873, devised a freehold cottage with all the land thereunto belonging described as "now in my own occupation." In September, 1873, he purchased two fields adjoining the cottage and occupied them until his death. In 1877 he made a codicil by which he appointed certain persons as trustees and executors of his will and confirmed his will in other respects. North J. came to the conclusion that the two fields passed under the will even apart from the republication of the will by the codicil. But after referring to *Barnes* v. *Crowe* (2) and other cases he added: "By these cases it seems to me perfectly well settled that, if there were nothing else in favour of the plaintiffs, the

(1) [1904] 1 Ch. 726, 734. (2) 1 Ves. Jun. 486.
(3) [1893] 1 Ch. 101, 111, 115.

codicil makes the will take effect as if it had been executed at the date of the codicil." This decision was affirmed by the Court of Appeal. Lindley L.J., after referring to the facts, said: "This codicil having been made after the purchase of the two fields, what is its effect upon the devise contained in the will? In my opinion, it is quite clear that the two fields, which as well as the cottage were in his own occupation when he made the codicil, passed. . . . ." It is, however, clear that the effect of republication is not such that one must necessarily construe the will for all purposes as though it had been made at the date of the codicil. That that was so was pointed out by Barton J. in an Irish case of *In re Moore* (1), and I am told that Eve J., in a recent case which is unreported, has taken the same view.

It is not right therefore to say that the effect of republication of a will is that you must necessarily and for all purposes construe the will as though it had been made at the date of the codicil. Barton J., in the case of *In re Moore* (1), in my opinion, accurately sums up the law on the subject when he says: "The authorities which have been cited"—mostly English authorities—"lead me to the conclusion that the Courts have always treated the principle that republication makes the will speak as if it had been re-executed at the date of the codicil not as a rigid formula or technical rule, but as a useful and flexible instrument for effectuating a testator's intentions, by ascertaining them down to the latest date at which they have been expressed. A glance at a few of the best known cases will, I think, support this view of the effect of republication. The Court has, by regarding a will as re-executed by republication, been enabled to validate a legacy to a witness to the original will: *Anderson* v. *Anderson* (2); to add to the will unattested papers which were sufficiently referred to in the will for purposes of identification and incorporation, but were not written and signed until after its execution; *Truro's* case. (3)" He then refers to (amongst others) *Barnes* v. *Crowe* (4), though not by name, by saying that the Court

(1) [1907] 1 I. R. 315, 318, 319, 320.
(2) (1872) L. R. 13 Eq. 381.
(3) (1866) L. R. 1 P. & M. 201.
(4) 1 Ves. Jun. 486.

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by regarding a will as re-executed by publication has been enabled "to include in a number of cases under the old law, after-acquired lands in a devise, from which they would otherwise have been excluded; and since the Wills Act, to ascertain, whenever it is necessary to do so, intention as regards after acquired property by reference to both will and codicil." After referring to *In re Champion* (1) and *In re Blackburn* (2) he refers to *In re Rayer* (3), and says: "Where a legacy was given subject to legacy duty, and a subsequent statute substituted succession duty for legacy duty, republication after the passing of the statute enabled the Court to give effect to the presumed intention of the testator that the legacy should be subject to the substituted duty."

In other words the Court, for the purposes of ascertaining the intention of the testator, would regard the republication of the will by the codicil as an expression of the testator's intention as at that date. When, therefore, the testator, at the date of his codicil, by which time legacy duty had been replaced by succession duty, expressed a wish that the legacy duty on the particular legacy should be paid, the Court was able to arrive at the conclusion that the testator intended to refer to succession duty. Then Barton J. goes on to point out: "On the other hand, the Courts have never allowed the republication of a will to contradict the acts or frustrate the intentions of a testator." He refers to certain other authorities, and sums the matter up as follows: "In short, the aim of the Court has always been to apply the rules as to republication, with good sense and discrimination, for the purpose of as far as possible effectuating *up to date* the intentions of testators."

It appears to me, in the circumstances, and having regard to the authorities, that I must construe the present will in light of the fact that by republication the testatrix has said to me: "This will expresses my intentions at this date" (i.e., the date at which this codicil was made), and that I must not disregard that fact. But Mr. Swords, on behalf of

(1) [1893] 1 Ch. 101. (2) (1889) 43 Ch. D. 75.
(3) [1903] 1 Ch. 685.

those interested in contesting the claim of Colonel McClintock's second wife, has asked me to pursue the following line of reasoning: He says that I must take the will first of all and substitute for the word "wife" the name of Colonel McClintock's first wife and then, he says, having done that, the testatrix has by her codicil only republished a will in which she has given a benefit to his first wife by name, and that, as his first wife predeceased the testatrix, the second wife cannot possibly take under that devise. It appears to me that to adopt such a course would not be to apply the rules as to republication with good sense and with discrimination, but to construe the will as though it had not been republished. I cannot substitute the Christian name of the first wife for the word "wife," unless I disregard the fact of the republication of the will and construe the will as though there had been no republication. What I have to construe is a will which has been republished, and which, as I say, is a will which the testatrix tells me expressed her wishes as they were at the date of her codicil. Approaching the document in that light, I find that the testatrix, knowing full well that Colonel McClintock's first wife was dead, has directed that this legacy of 5000*l.* shall be held for the benefit of Colonel McClintock, his wife and children. Now, he had no wife at that time; therefore, if those were the testatrix's wishes at the date of the codicil, the only person who could take under that provision would be, and is, the lady whom Colonel McClintock married after the testatrix's death in 1903. It appears to me, therefore, that I ought to answer the questions that have been asked by the summons by declaring that according to the true construction of the will and codicil, and in the events which have happened, the second wife of Colonel McClintock has an interest for her life or until she shall re-marry in the sum of 5000*l.*

This decision is, of course, without prejudice to the question as to what would happen if she were to re-marry.

Solicitors: *Maples, Teesdale & Co.*

J. L. D.

ROMER J.

1925

Jan. 19, 21;
Feb. 26.

In re VISCOUNT PORTMAN (No. 2).

[1923. P. 1207.]

Inland Revenue—Estate Duty—Settlement—Perpetual yearly Rentcharge—Payable without any Deduction except for Death Duties—Liability to Abatement—Assessment of Duty—Limited Owner—Method of ascertaining Proportion of Estate Duty—Income Tax—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 1; *s.* 8, *sub-s.* 4; *s.* 14, *sub-s.* 1.

A rentcharge of 50,000*l.* per annum charged on London settled estates was limited to the use of the defendant, the fourth Viscount Portman, for life with remainder to the use of his eldest son during his life, to commence from their respective successions to the title and to be paid without any deduction except for death duties, and a similar rentcharge was limited in remainder (in the event of any other issue of the fourth Viscount succeeding to the title) to the use of the sons of such eldest son and other sons of the fourth Viscount in tail male. Subject to such rentcharge, the London settled estates were limited to the use of the plaintiff for life with remainder to the use of his eldest son for life with remainders over.

By a deed poll dated October 15, 1913, provision was made for the abatement of the 50,000*l.* rentcharge in certain events.

The third Viscount, who was tenant for life of the estates in question, had died in 1923, while nine of the sixteen half-yearly instalments of estate duty payable in respect of the death of the second Viscount, who had died in 1919, remained unpaid. One of the questions for the decision of the Court at the original hearing of the summons (see *In re Viscount Portman* [1924] 2 Ch. 6) was as to what proportion of the balance remaining unpaid at the death of the third Viscount of the estate duty which became assessable on the death of the second Viscount in respect of the London estates should be borne by the yearly rentcharge of 50,000*l.*, and it was admitted in argument that there was no difference in principle in respect of that unpaid balance between that duty and that which was assessable upon the death of the third Viscount. It was held that while the 50,000*l.* rentcharge was payable, the owner should be treated, for the purpose of apportioning estate duty, as the tenant for life of a capital sum charged on the estate equal to the capitalized value, as at the death of the third Viscount, of a perpetual or adequately secured rentcharge of 50,000*l.*, which capital sum would be treated as chargeable with estate duty at the rate charged upon the death of the third Viscount, and that the fourth Viscount as the owner of the rentcharge would, so long as it was payable, have to pay interest in respect of such estate duty at the rate ascertained, as in *In re Parker-Jervis* [1898] 2 Ch. 643. Provision was also made as to the mode of apportioning the duties in the event of the abatement of the rentcharge.

After judgment had been delivered and before the minutes had been finally drawn up, leave was given to withdraw the admission made

in argument as aforesaid, and it was directed that the question with regard to the liability of the rentcharge in respect of the unpaid instalments of estate duty assessable on the death of the second Viscount should be argued:—

Held, that the effect of s. 14, sub-s. 1, of the Finance Act, 1894, was to throw the incidence of the duty rateably and in proper proportions upon all persons becoming beneficially interested in the property upon which the duty was constituted a first charge by force of s. 9, sub-s. 1, of the Act; that the rentcharge (or the abated rentcharge) must be dealt with, as regards these unpaid instalments, in the manner indicated in the original judgment; and that the order would, therefore, be in the terms of the minutes prepared in accordance with that judgment.

In re Charlesworth's Trusts [1912] 1 Ch. 319 followed.

ADJOURNED SUMMONS.

The second Viscount Portman died on October 16, 1919. Immediately before his death all the Portman settled estates stood limited, under various settlements and in the events which had happened, in manner following: Under a settlement of 1870, to the use of the second Viscount for life with remainder to the use of the third Viscount for life with remainders (which subsequently failed) to his first and other sons successively in tail male, with remainder (under a settlement of 1911) if the defendant, the fourth Viscount, should (as happened) succeed to the title, to the uses following—namely, as to the settled estates in the counties of Dorset, Somerset and Devon to the use of the fourth Viscount for life with remainder (as to the said settled estates other than those in the county of Dorset) to the use of his eldest son for life, if he should succeed to the title, with remainders over (in the event of any other son of the fourth Viscount succeeding to the title) to certain uses in favour of his sons and the other sons of the fourth Viscount in tail male; and as to the settled estates in London to the use that the fourth Viscount and his assigns during his life and after his death to the use that his eldest son during his life on succeeding to the title, should each receive thereout a yearly rentcharge of 50,000*l.*, to commence from their respective successions to the title and to be paid without any deduction except for death duties by equal quarterly payments; and a similar rentcharge was limited in remainder (in the event of any

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other issue of the fourth Viscount succeeding to the title) to the sons of such eldest son and the other sons of the fourth Viscount in tail male. Subject to the limitations aforesaid and, as to the estates charged with the 50,000*l.* rentcharges, subject thereto, all the Portman settled estates were by the settlement of 1911 limited to the use of the plaintiff for life with remainder to the use of his eldest son for life with remainder to the use of his first and other sons successively in tail male with remainders over.

By a deed poll dated October 15, 1913, provision was made for the abatement of the 50,000*l.* rentcharge in any year in which the income for that year from the London estates, after payment thereout in manner therein mentioned, should be less than 100,000*l.*

Upon the death of the second Viscount estate duty became payable in respect of the London estates by sixteen half-yearly instalments, only seven of which had been paid before the death of the third Viscount, who died on January 18, 1923, without ever having had male issue, and was thereupon succeeded in the title by his brother, the fourth Viscount. The balance under the nine instalments then due amounted to about 1,300,000*l.* Further estate duty became payable on the death of the third Viscount.

A summons was taken out for the determination (inter alia) of the question, What proportion of (*a*) the balance remaining unpaid at the death of the third Viscount of the estate duty which became assessable upon the death of the second Viscount in respect of the London estates and (*b*) the estate duty which became assessable upon the death of the third Viscount in respect of the London estates, should be borne by the yearly rentcharge of 50,000*l.* appointed by the settlement of 1911 to the fourth Viscount during his life, as subject to abatement under the deed poll of October 15, 1913, and in what manner he ought to contribute to such duty and the interest thereon?

At the original hearing it was admitted in argument on the part of the fourth Viscount that the decision as to what proportion of the estate duty which became assessable on the

death of the third Viscount ought to be borne by the rent-charge limited to the fourth Viscount, would also determine the question of what proportion should be borne by the rent-charge of the instalments of estate duty assessable upon the death of the second Viscount remaining unpaid at the death of the third Viscount, and that no distinction in principle existed between the two cases.

Judgment, prescribing the proper mode of assessment, was consequently delivered on that footing.

Subsequently, on the application of counsel before the minutes were finally drawn up, leave was granted for the withdrawal of the admission made in argument and the question was argued as to whether the rentcharge was liable to bear any portion of the above mentioned unpaid instalments of estate duty and, if so, as to the amount of and the manner in which such portion was to be assessed.

Maugham K.C. and *McMullan* for the plaintiff. No question arises as to the correctness of the decision at the previous hearing. The question which now arises is whether the decision as to the apportionment of the payment of estate duty is or is not to be confined to estate duty arising on the death of the third Viscount. So far as the duty on the death of the second Viscount which is still unpaid is concerned, the position is just the same as it is with regard to the duty payable on the death of the third Viscount. Under the Finance Act, 1894, the only duty for which the parties in 1911 had any need to provide was the estate duty payable under the Act of 1894. The words " except for death duties " in the settlement point directly to the duty payable on the death of the second Viscount. Under the Act of 1894, however, a proper rateable part of the estate duty necessarily falls on the rentcharge, and that will be the case, however many deaths take place under the settlement comprising the disposition in question. The most material sections in the Act of 1894 are s. 1, s. 8, sub-s. 4, and s. 14, sub-s. 1. The general view which has been adopted by the Courts is that a charge for death duties is a charge of a very peculiar character.

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Property on which death duty is levied is property which shrinks in consequence, and this shrinkage affects every part of the property. There is no reason for confining a reference to estate duty or death duty to estate duty payable on the death of a testator: *Berry* v. *Gaukroger.* (1) In *In re Charlesworth's Trusts* (2) Mr. Austen-Cartmell in his argument sought to distinguish *Berry* v. *Gaukroger.* (1) The effect of his argument, as applied to the present case, is to contend that the present owner of the rentcharge did not become entitled until the death of the third Viscount. Joyce J. in effect says that s. 14, sub-s. 1, is not limited to the duty which became payable at the moment when the two interests became interests in possession. *In re Charlesworth's Trusts* (2) goes as far as, if not further than, the Court is asked to go in the present case. The net result of that decision is that where, during the existence of a settlement, estate duty becomes payable, the shrinkage applies to the whole property. The duty becomes evenly distributed as the result of the above mentioned sections, and every one concerned is obliged to bear his or her share. The duty remaining unpaid in respect of the death of the second Viscount must therefore be apportioned.

Hughes K.C. and *Methold* for the two infant sons of the plaintiff. The interest of these defendants does not differ from that of the plaintiff.

Upjohn K.C. and *Whinney* for the defendant Viscount Portman. It is not disputed that in respect of these unpaid instalments there is a charge on the estate and that the fourth Viscount takes subject to the charge. In other words he takes subject to an overriding charge in respect of the unpaid balance, and the only question is whether his rentcharge must bear some specific portion of these unpaid instalments. The only estate duty in respect of which the rentcharge must, under the Act of 1894, be affected is the estate duty payable on the death on which that part of the settled property represented by the specific rentcharge passed to the fourth Viscount. Counsel for the plaintiff does not seek to confine

(1) [1903] 2 Ch. 116. (2) [1912] 1 Ch. 319.

the phrase "except for death duties" to the death of the second Viscount. He admits its extension to the death of the third Viscount. It is a general provision, and means that the death duties are to be paid wholly or partially out of this 50,000*l.* rentcharge. There is no case, except in *In re Charlesworth's Trusts* (1), in which it has been suggested that estate duty was payable wholly or in part by some one to whom the property did not pass on the death of the person on whose death the estate duty became payable. Sect. 8, sub-s. 4, is the really important section. This property did not pass on the death of the second Viscount. Sect. 14, sub-s. 1, is really a procedure section, and is merely complementary to s. 8, sub-s. 4. The language of that section cannot be made applicable to two different estate duties. The duty to which s. 14, sub-s. 1, applies is the charge. Sect. 14 could not apply to some former estate duty. The charge arose at the same time as the residuary interest arose. Here the property is not property passing on the death of the second Viscount. Sect. 14 states that the person who is liable to pay the charge shall repay his obligation. The question is whether the Finance Act throws the duty or any part of the duty on the person against whom the claim is made—in other words where the provision is which throws the duty, in respect of the estate of the Viscount who died in 1919, on the fourth Viscount, whose only interest is contingent on the happening of some subsequent event.

Maugham K.C. in reply. The contention that s. 14, sub-s. 1, is a sort of correlative to s. 8, sub-s. 4, is wrong. It is sought, on behalf of the fourth Viscount, to establish the proposition that s. 14, sub-s. 1, must be tied up to s. 8, sub-s. 4, on the assumption that s. 8, sub-s. 4, does not apply to the present case. Sect. 14, sub-s. 1, is not limited to the apportionment of duty as between beneficiaries. Its primary object is to enable the apportionment of duty to take place when a charge has been made on the property long before any duty has become chargeable at all. Sect. 14, sub-s. 1, primarily says that when a person inherits property and has to pay duty on

(1) [1912] 1 Ch. 319.

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it he is entitled, having paid such duty, to recover: *In re Hacket* (1); *In re Hartland.* (2) Sect. 14 applies to recovery and is not limited to the claim for the apportionment being made. It applies to every case where there is property charged with capital or with an annuity and the person who inherits the estate is required to pay those death duties. The Legislature, when imposing these large duties on property which did not pass to the executors as such, i.e. on land, desired to apportion the burden on all the people who became entitled to the land so that the Finance Act should not prejudicially affect arrears of rentcharges. With regard to s. 8, sub-s. 4, the language of that sub-section is consistent with this, that when the property does reach a beneficiary in possession he becomes liable and has to render his account. The property has passed on the death of the second Viscount, and on the death of the third Viscount the fourth Viscount becomes entitled to a beneficial interest. The mere fact that the property did not pass into the possession of the fourth Viscount on the death of the second Viscount is no reason why the section should not apply. Section 8, sub-s. 4, is not limited to cases where persons are deriving interests immediately; confined, as s. 8, is to property not passing to the executor as such, sub-s. 4 of that section attaches a charge of a kind in the sense that a person taking property under a settlement is accountable for estate duty. It is submitted that the Legislature intended to apportion between all persons becoming entitled such proper proportion of the duty as might be payable irrespective of the number of deaths. The sub-section is not limited to duty which became payable only on the death of the last Viscount. Having regard, therefore, to the express reference to death duties in the deed of 1911 and to the authorities the original view is right and the duties are payable as originally indicated.

Manning K.C. and *J. W. F. Beaumont* for the trustees.

Cur. adv. vult.

(1) [1907] 1 Ch. 385. (2) [1911] 1 Ch. 459.

Feb. 26. ROMER J. After I had given judgment upon the summons in this case, I gave leave to the parties to argue a question that had not been raised at the hearing before me. It is the question whether the rentcharge appointed by the 1911 settlement to the use of the fourth Viscount during his life is liable to contribute to the instalments of the estate duty, assessable on the death of the second Viscount, that had not been paid before the death of the third Viscount. At the hearing before me it had been assumed by all parties that this question must be answered in the affirmative. Since then, however, the question has been elaborately argued, and I must now give my judgment upon it.

It was contended, in the first place, on the plaintiff's behalf, that an obligation to contribute to the estate duty in question was in terms imposed upon the owner of the rentcharge by the settlement of 1911. The argument was this. Under the law as it stood at the date of that settlement, settlement estate duty would have been payable upon the death of the second Viscount, and no further estate duty would have been payable in respect of the London estates upon the subsequent death of the third Viscount. According to the terms of the 1911 settlement, however, the rentcharge was to be paid without any deduction except for death duties. The death duties there referred to must, therefore, so the argument ran, be the death duties assessable upon the death of the second Viscount, as the appointors could not have had any others in their minds. It is, however, to be observed that, if the third Viscount had died without male issue during the lifetime of the second Viscount, then on the death of the latter the rentcharge would at once become an interest in possession, and admittedly liable to bear a part of the estate duty leviable upon his death. I cannot therefore treat the appointors under the 1911 settlement as necessarily intending to impose upon the owner of the rentcharge a liability to contribute to the estate duty leviable upon the death of the second Viscount in the event of his predeceasing the third Viscount. In the circumstances I cannot regard

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the direction that the rentcharge was to be payable " without any deduction except for death duties " as imposing any liability on the owner of the rentcharge to contribute to any death duties for which he would not have been liable in the absence of that direction. I must therefore proceed to consider whether the liability to contribute to the unpaid instalments of death duty to which I have referred is imposed by the Finance Act of 1894, as amended by s. 14 of the Finance Act of 1914.

On the death of the second Viscount the London estates passed, within the meaning of s. 1 of the Finance Act, 1894, and estate duty became payable upon the principal value of those estates. His executor was not liable to pay that duty, but might do so if the persons accountable for the duty requested him to make such payment: see s. 6, sub-s. 2. By sub-s. 4 of that section it is provided that estate duty, so far as not paid by the executor, shall be collected upon an account delivered to the commissioners within six months after the death by the person accountable for the duty. By sub-s. 7 the duty becomes due on the delivery of the account, or on the expiration of six months from the death, whichever first happens. Sub-s. 8, however, gives the person delivering the account the option of paying the duty upon real estate by eight equal yearly instalments, or sixteen half-yearly instalments, with interest from the date at which the first instalment is due, which is at the expiration of twelve months from the death. It is, however, to be observed that if the property is sold, all unpaid duty becomes payable on completion of the sale. In the present case the person delivering the account, who presumably was the third Viscount, elected to pay the estate duty by sixteen half-yearly payments. So far, the Act renders no one liable to pay the estate duty in question, nor is there, so far, anything to indicate what persons are accountable for the duty, if the Act intends to draw any distinction between persons liable and persons accountable. This brings me to s. 8. By sub-s. 3 thereof the executor is made accountable for the estate duty in respect of all personal property of which the deceased was

competent to dispose at his death, but is not liable for any duty in excess of the assets which he has received as executor, or might, but for his own neglect or default, have received. He is not therefore accountable or liable for the duty in respect of real estate passing upon the death. The sub-section seems, however, to recognize some distinction between accountability and liability for duty, and so do sub-s. 11 and sub-s. 18. But a person who is made accountable for the duty must clearly be liable for it. Otherwise there would not seem to be anything in the Act making any one personally liable to the Crown for the estate duty in respect of real estate passing upon the death. It does seem, however, as though the Legislature contemplated the existence of a liability to duty in cases where there might be no accountability.

Real estate passing upon the death, and personal estate so passing of which the deceased was not competent to dispose, are dealt with in sub-s. 4. That sub-section is as follows: "Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received, or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the commissioners allow, deliver to the commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property." Upon the death of the second Viscount the third Viscount accordingly became accountable for the estate duty in respect of the London estates. The fourth Viscount was not accountable. For his rentcharge did not become an interest in possession upon

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the death of the second Viscount, and when it did become an interest vested in possession it did not become so vested by alienation or other derivative title within the meaning of the sub-section.

The next relevant provision of the Act is s. 9, sub-s. 1. It is in these terms: "A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable: provided that the property shall not be so chargeable as against a bona fide purchaser thereof for valuable consideration without notice." Upon the death of the second Viscount the London estates became therefore charged in favour of the Crown with the estate duty payable in respect of those estates. The charge was a first charge, and accordingly ranked in priority to the rentcharge of the fourth Viscount. So far, however, there is nothing to indicate that as between that rentcharge and the London estates it has to bear any part of the duty. Nor is there any such indication in sub-s. 5. If, in order to pay the estate duty in question, the third Viscount had raised it by a sale or mortgage of part of the London estates, the security for the rentcharge would have been pro tanto diminished. But the rentcharge, when it came into possession, would still rank in priority to the interests of the persons entitled to the remainder of the estates, or the equity of redemption, as the case might be. A similar result would follow if the third Viscount, instead of raising the money by sale or mortgage, of part of the London estates, paid the duty out of his own assets, and so became entitled to the charge given him by sub-s. 6. It is not necessary to refer to any other provision in the Act except s. 14, sub-s. 1. That sub-section is in these terms: "In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person who being authorised or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise,) under a

disposition not containing any express provision to the contrary." It has been suggested, having regard to the decision in *Berry* v. *Gaukroger* (1), to which I must presently refer, that this sub-section deals with the recovery rather than with the incidence of the duty: see Austen-Cartmell on the Finance Acts, 5th ed., p. 157. Mr. Upjohn's argument before me was to the same effect. He said that the sub-section was only machinery. If this be well founded, then it must follow that the rentcharge is not liable to contribute to the estate duty payable on the death of the third Viscount, for, as I have already pointed out, there is nothing in the earlier part of the Act to impose such liability. I cannot agree, however, that the sub-section is merely machinery, or that it does not deal with the incidence of estate duty. In cases where a deceased owner of real estate has in his lifetime created a present incumbrance upon it of such a nature that having regard to s. 7, sub-s. 1, no allowance can be made for the incumbrance in determining the value of his estate for the purpose of estate duty, the owner of such incumbrance is liable to pay a proportionate part of the duty: see *In re Hacket.* (2) The owner of the incumbrance is not, however, a person who is made accountable for the duty under any section preceding s. 14, inasmuch as no interest in the incumbered property passes to him upon the death of the deceased. He is liable only by reason of s. 14. I am unable to find in *Berry* v. *Gaukroger* (3) anything inconsistent with this view. In that case a fund had been set aside to meet an annuity given by the will of a testator who had died before the coming into operation of the Finance Act, 1894. The fund consisted partly of proceeds of the sale of real estate. After the death of the annuitant certain legacies were payable out of the fund, and the remainder was distributable amongst the persons entitled to the residue of the testator's estate. The annuitant died after the Act came into force, and estate duty accordingly became payable in respect of the fund. The question to be decided was as to whether the legacies

(1) [1903] 2 Ch. 116. (2) [1907] 1 Ch. 385.
(3) [1903] 2 Ch. 116, 131, 133, 134.

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ought to bear their proportionate part of the estate duty that was payable in respect of so much of the fund as represented real estate. Before Buckley J. the argument on behalf of the persons entitled to the residuary estate seems to have been based entirely upon s. 14. They contended that the legacies constituted a charge upon the fund. Buckley J. came to the conclusion that no person was made liable by s. 14 who was included within the class of persons made accountable for duty under s. 8, sub-s. 4, and that the persons entitled to the legacies were made accountable by the latter section as being persons who upon the death of the annuitant took a beneficial interest in possession and did not take by way of charge. I cannot altogether understand why, in this view of the case, he held that the legacies were not liable to bear any part of the estate duty. It may have been that, although the legatees were persons made accountable for the duty under s. 8, sub-s. 4, the learned judge considered that the ultimate liability for the duty as between the persons made accountable was a matter upon which the Act was silent, and fell to be determined in accordance with the usual principles applicable as between pecuniary and residuary legatees. There is certainly nothing to be found in his judgment to give colour to the suggestion that s. 14 does not deal with the incidence of estate duty. In the Court of Appeal the argument for the residuary legatees was still based in the first instance upon s. 14, sub-s. 1. But it was based alternatively upon s. 8, sub-s. 4. It was this alternative argument that ultimately prevailed. Vaughan Williams L.J. agreed with most of the premises arrived at by Buckley J., but could not agree in his ultimate conclusion. He said: "It seems to me that the moment you find that under s. 8, sub-s. 4, every person to whom property (other than free property of the testator) passes for a beneficial interest in possession (which includes these pecuniary legatees) is accountable for the duty, be it on the whole fund or his portion of the fund, and therefore pro tanto a debtor to the Crown, the Court ought in the due course of administration to take the whole duty out of the fund, and to deduct that duty

rateably from the legacy of each legatee and from the residuary share alike. If this were not so, the ultimate incidence of the estate duty on the fund passing would depend upon the accident of which of the parties accountable was in fact called on to pay, or on the fact that no one was called on to pay, but that payment was left to be determined in due course of administration. It seems to me that the pecuniary legatees cannot relieve themselves of the burden of a rateable part of this duty unless they can show that, outside the Finance Act, there is something which entitles the pecuniary legatees to have, as against the residuary legatees, the amount of their legacies free of estate duty." He then gave his reasons for coming to the conclusion that there was nothing outside the Finance Act entitling the legatees to have their legacies free of such duty. Romer L.J. held that the legacies were property which passed upon the death of the annuitant for a beneficial interest in possession, and that under s. 9, sub-s. 1, the duty assessable as against the legacies became a first charge on the legacies as against the legatees; that, this being so, there was nothing to justify the Court in holding that as between the residue and the pecuniary legatees the former ought to indemnify the latter against such duty. He added that, in this view, it was unnecessary for him to consider the effect of s. 14, sub-s. 1. Cozens-Hardy L.J., after referring to the fact that before Buckley J. the argument for the residuary legatees rested merely upon s. 14, sub-s. 1, the legacies being treated as charged upon the fund belonging to the residuary legatees, said: "I doubt whether this contention was well founded; but it is not in my view necessary to decide this, for I prefer to base my judgment upon s. 8, sub-s. 4. I think the legacies must be regarded as property which passed to the legatees for a beneficial interest in possession on the death of the annuitant. If so, the legatees were accountable to the Crown for the estate duty. It is true that the Crown, having the right to demand the duty from other persons—namely, the trustees—has not proceeded against the legatees; but that, I think, can make no difference. It is an old and well established principle of equity that,

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when several persons are liable in respect of one and the same obligation, the rights of the parties inter se are not affected by the circumstance that one of those persons has been called upon to discharge and has discharged the obligation. This right of contribution must, I think, prevail here; and although the money has been found out of the entire fund, it ought to be contributed rateably according to the beneficial interests in the fund, or, in other words, the legatees must bear their rateable proportion." I can find nothing in any one of these judgments that seems to indicate that the Court regarded s. 14, sub-s. 1, as mere machinery, or as dealing with the recovery as opposed to the incidence of estate duty.

Treating the sub-section then as imposing a liability to contribute to the estate duty upon persons who are not, or who at any rate may not, have been rendered liable by any preceding section, the question that I have to determine seems to resolve itself into this. The third Viscount being required to pay the duty in respect of the London estates, had paid a part of such duty, amounting to seven out of sixteen half-yearly instalments, before the date of his death, and his legal personal representatives, since his death, have paid, or in due course will have paid, the remaining nine instalments, he and they being entitled to raise the requisite money by sale or mortgage under s. 9, sub-s. 5, or being entitled to the charge given by s. 9, sub-s. 6. The fourth Viscount is now entitled to a sum charged upon such property as a rentcharge, and was so entitled at the time that the eighth and subsequent half-yearly instalments became payable. Can, therefore, the legal personal representatives of the third Viscount recover against the fourth Viscount a proper rateable part of the duty so paid by them, the disposition under which the rentcharge was created admittedly containing no express provision to the contrary? If he can, the liability will, of course, be discharged by the fourth Viscount submitting to a deduction from his rentcharge of the interest on a proportionate part of the duty in accordance with the principle I indicated in my former judgment in this

matter. The determination of this question depends upon the meaning to be attributed to the word "entitled" in the sub-section. It may mean entitled: (1.) At or upon the death of the person upon whose death the property passed, or (2.) at the time when the duty became due under s. 6, sub-s. 7, or (3.) in cases where the option given by s. 6, sub-s. 8, is exercised, at the date when any instalment becomes due, the liability of the person entitled to the sum charged being confined to any such instalment, or (4.) at the time when any duty is in fact paid, or (5.) at any time.

The only authority bearing upon this question seems to be the case of *In re Charlesworth's Trusts.* (1) In that case a trust fund had been settled in 1897 upon trust to pay the income thereof to the settlor for life, and after his death to his wife for life, and after the death of the survivor upon trust as to 10,000*l.*, part of the fund, for such persons as the wife should by will appoint, and the remainder of the fund was to fall into the settlor's residuary estate disposed of by his will. On the settlor's death in 1908 estate duty was paid on the fund. The wife died in 1911, having appointed the 10,000*l.* by her will. The question to be decided was whether this sum ought to bear any part of the estate duty in question. Joyce J. held that the duty must be borne rateably by the wife's appointees, and the settlor's residuary legatees. In the course of his judgment he expressed himself as follows: "Why this duty should be borne by one part of the fund and not by the other part, I cannot see. In my opinion *Berry* v. *Gaukroger* (2) applies to this case. When the two cases are compared there is no substantial difference between them. I think that the judgment of Cozens-Hardy L.J. is conclusive." But the judgment of Cozens-Hardy L.J. in *Berry* v. *Gaukroger* (2) was based upon the fact that the pecuniary legatees in that case became entitled to a beneficial interest in possession immediately upon the death of the person on whose death the estate duty became leviable, and so became personally liable to a proportionate part of the duty under s. 8, sub-s. 4. In the case before Joyce J.

(1) [1912] 1 Ch. 319, 322. (2) [1903] 2 Ch. 116.

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the 10,000*l.* did not become an interest in possession, or at all, until the death of the wife. With all deference, therefore, to the learned judge, I am unable to see how the judgment of Cozens-Hardy L.J. was conclusive upon the point. For there was nothing in the sections of the Act preceding s. 14 to impose any liability to the duty upon the persons who ultimately became entitled to the 10,000*l.* Joyce J., however, continued as follows : " If it is said that there is a charge and that the 10,000*l.* is to be paid first, then s. 14, sub-s. 1, is an answer to that. If Mrs. Charlesworth had died before her husband and there had been no intervening life estate, I do not see how the duty could have failed to have been apportioned between the two parts of the fund. In my opinion Mrs. Charlesworth's intervening life estate makes no difference, and I hold that the duty must be borne rateably by those who take the 10,000*l.*, and those who take the remainder of the settled fund." It will be observed that the learned judge did not say that the 10,000*l.* was a charge upon the fund. To have done so would have been to disregard the doubts expressed both by Vaughan Williams L.J. and Cozens-Hardy L.J. in *Berry* v. *Gaukroger*. (1) But he must undoubtedly have been of the opinion that if the 10,000*l.* did constitute a charge upon the fund it ought to bear a rateable part of the estate duty, although it did not become a charge until after the duty had been paid. He therefore treated the word " entitled " in s. 14, sub-s. 1, as meaning entitled at any time.

I think that I ought to follow this decision. It was given over thirteen years ago, and, for aught I know to the contrary, it has been acted upon in practice ever since. Apart altogether from this, it gives effect to the prima facie meaning of the words in the sub-section. Directly you find that a person is entitled to a charge upon property in respect of which estate duty has been paid, the charge being created by a disposition not containing any express provision to the contrary, that person is liable to pay a proper rateable part of the duty. In such a case as the present one he can only escape that

(1) [1903] 2 Ch. 116, 130, 134.

liability by qualifying in some way or another the word " entitled " in the sub-section. The sub-section itself contains no qualification, and if one is to be implied it must be by reason of some of the earlier provisions of the Act. But when once the conclusion is arrived at that the sub-section is not mere machinery for giving effect to those earlier provisions, there is not, so far as I can see, any justification for implying any such qualification. Construing the sub-section, as I do, as being a substantive enactment imposing a liability upon persons who are not, or at any rate may not, be rendered liable under the earlier sections, I can see no reason for introducing into it any qualification that is not there expressed. So treating the sub-section, the effect will be to throw the incidence of the duty rateably and in proper proportions upon all persons becoming beneficially interested in the property upon which the duty is constituted a first charge by force of s. 9, sub-s. 1, of the Act. And this would seem to be fair, and certainly not otherwise than in accordance with what would appear to be the general principles underlying the Act.

In the present case the plaintiff has not by his summons, or at the Bar, sought to make the fourth Viscount responsible for the instalments of the estate duty that were paid before the death of the third Viscount. He merely asks that the fourth Viscount shall bear his proper proportion of the duty paid after the third Viscount's death.

In these circumstances the order will go in the terms of the minutes prepared in accordance with the judgment originally given by me. The order will be dated as of to-day.

Solicitors for plaintiff and the defendant trustees: *Wilde, Wigston & Sapte.*

Solicitors for the defendant Viscount and his son: *Greenfield & Cracknall.*

Solicitors for the infant defendants: *Rawle, Johnstone & Co.*

J. L. D.

TOMLIN J.
1925
Feb. 4.

In re BLACKWELL.

BLACKWELL *v.* BLACKWELL.

[1924. B. 6077.]

Will—Construction—Vested and Contingent Interests—Devise to Eldest of Testator's Sons (if any) "who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years"—Accumulations.

A testator devised his real estate, subject to certain interests in favour of his wife during her widowhood, upon trust for the eldest of his sons (if any), "who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years," and, failing such son, then he directed that the same should be held upon the trusts concerning his residuary estate. The testator died in October, 1912, leaving one son, aged six months. The testator's widow remarried in 1917. Questions having arisen owing to the claims for super tax in respect of the income of the son, a summons was taken out for the purpose of having it determined what interest the son took, on the death of the testator, in the real estate:—

Held, that the son became, on the testator's death, entitled to the real estate contingently on his attaining the age of twenty-one years.

The trustees had accumulated certain of the rents and profits of the real estate.

Held, that the son took a like interest in the accumulations.

THE testator, by his will dated December 13, 1909, gave to his trustees his freehold estate at Oxhey, near Watford, upon trust to allow his wife to reside there during her widowhood, and, subject to her interest therein, he directed his trustees to hold the same, together with his freehold property at Bushey and his freehold premises, 21 Soho Square, upon trust for the eldest of his sons (if any) "who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years," and, failing such son, he directed that the same should be held upon the trusts concerning his residuary estate. Then he gave his residuary estate to his trustees upon trust for sale and conversion, and he conferred upon them certain powers in relation to any property for the time being unconverted, including a direction to offer 21 Soho Square to his brother at a certain price "in the event of my leaving no son who shall inherit the same under the provisions hereinbefore contained." The trusts declared of residue were, subject to certain annuities in favour of the testator's

wife, for " my child if only one wholly or for all my children (including my said eldest son) if more than one in equal shares and to be an interest or interests absolutely vested on my death." Then there was a substitution of issue for a child dying in the lifetime of the testator. The will also contained a power of advancement out of the capital or share to which each child was entitled under the will, and the trustees were empowered to apply " the whole or such part as they he or she shall think fit of the annual income of the property or share to which any infant shall be entitled or contingently entitled under this my will or any codicil hereto in or towards his or her maintenance and education or otherwise for his or her benefit," with a direction to accumulate any surplus and add it as capital, " to the property or share whence the same shall have arisen."

The testator died on October 10, 1912, leaving a widow and four children, three daughters and one son, the defendant, Thomas Antony Blackwell, who was born on April 12, 1912. The widow of the testator remarried on April 18, 1917. The trustees had from time to time accumulated the whole of the net income derived from the specifically devised real estate. Questions having arisen owing to claims for super tax in respect of the income of T. A. Blackwell, the trustees of the will took out this summons asking : (1.) whether, according to the true construction of the will, the defendant, T. A. Blackwell, became, on the testator's death, indefeasibly entitled in possession to the freehold property in question for an estate in fee simple, notwithstanding that he had not attained the age of twenty-one years ; (2.) if not, whether he took a vested equitable interest therein in possession, liable to be divested on his dying under the age of twenty-one years, or merely an equitable interest contingent upon his attaining that age ; and (3.) whether he took an interest, of a like nature, whether vested or contingent, in the accumulations of the rents and profits of the specifically devised real estate.

Nicholson Combe for the plaintiffs.

Dighton Pollock for the specific devisee. The introduction

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of the word "absolutely" into the specific devise indicates that the testator intended to give the devisee something more than a contingency. In Hawkins on Wills, 2nd ed., p. 284, where *Boraston's Case* (1) is dealt with, the rule is laid down that where there is a devise to A. on his attaining a given age, with an intermediate devise to B., A. takes an immediate vested estate, not defeasible on his death under the specified age. Where the devise is to A. "if" he attains twenty-one, the rule in *Boraston's Case* (1) does not apply. Another class of cases is represented by *Phipps* v. *Ackers* (2), where, the devise being to G. H. A. when he should attain the age of twenty-one years, with a gift over in the event of his dying under that age, it was held that an equitable estate in fee vested in G. H. A. immediately on the testator's death, liable to be divested in the event of his dying under twenty-one. *In re Astor* (3) is an example of the case where the interest of the devisee is held to be contingent. In that case Russell J. outlined a supposed gift (4), very similar to the gift in this will, and said that if that had been the gift he would have followed *Phipps* v. *Ackers*. (2) The words "failing such son" do not introduce a class idea.

[He also referred to *In re Francis*. (5)]

Vernon for the residuary estate. The gift here is clearly contingent. The devisee must comply with three contingencies: (1.) he must be the eldest son of the testator; (2.) he must attain the age of twenty-one years; (3.) he must be living at the death of the testator. This case is really governed by *Alexander* v. *Alexander* (6), where the devisee was held to take a contingent interest. *Phipps* v. *Ackers* (2) does not apply here. The principle is set out in Hawkins on Wills, 2nd ed., p. 283. The devisee only takes absolutely on his attaining the age of twenty-one years, and contingently until he attains that age.

[He also cited *Doe* v. *Lucraft*. (7)]

(1) (1587) 3 Rep. 19A.
(2) (1842) 9 Cl. & F. 583.
(3) [1922] 1 Ch. 364.
(4) [1922] 1 Ch. 368, 369.
(5) [1905] 2 Ch. 295.
(6) (1855) 16 C. B. 59.
(7) (1832) 1 Moo. & S. 573.

TOMLIN J. The question which I have to determine in this case is, what is the nature of the interest taken by the son of the testator under a devise of real estate ?

The principle governing the construction of devises of real estate is reasonably clear, and is stated in Hawkins on Wills, 2nd ed., p. 283 : " In the construction of devises of real estate, 'it has long been an established rule for the guidance of the Courts . . . . that all estates are to be holden to be vested, except estates in the devise of which a condition precedent to the vesting is so clearly expressed that the Courts cannot treat them as vested without deciding in direct opposition to the terms of the will.'" As a result of that doctrine there are two classes of cases in which it has been held that a gift with words suggesting contingency or condition is not contingent or conditional at all. The first class is illustrated by *Boraston's Case* (1), where a gift to one person when he shall attain a given age, with an intermediate interest given to another, has been read as a devise to the other for a term of years, with a remainder to the first named donee. *Phipps* v. *Ackers* (2) is the leading case of the other class where there is a gift over, and the gift over is read as being an executory gift over in a certain event, the first donee taking a vested interest liable to be divested in that event. The principle upon which that conclusion is reached was stated by Wigram V.-C. in *Bull* v. *Pritchard* (3) : " Where the devise is to a party at a given age, and the property is given over if the devisee dies under that age . . . . the Court has discovered an intention expressed in the will, that the first devisee shall take all that the testator has to give, except what he has given to the devisee over ; and, in order to give effect to that intention, has held, by force of the language of the will, that the first devise was not contingent, but vested, subject to be divested upon the happening of the event upon which the property is given over."

On the other hand, it has been held that a devise of real estate to a devisee when he shall attain a given age, without

(1) 3 Rep. 19A. (2) 9 Cl. & F. 583.
(3) (1846) 5 Hare, 567, 571.

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more, is contingent on the age being attained, and an example of that is *In re Francis.* (1)

Now, there being no question here of the class of case in which an intermediate interest is given to a third party, I have to see whether, upon the principle of the cases of which *Phipps* v. *Ackers* (2) is the chief, there is a context by virtue of which I must hold that the principle of *In re Francis* (1) does not apply, and that in consequence there is a vested gift liable to be divested on the donee failing to attain the given age. The language is "for the eldest of my sons (if any), who shall be living at the time of my death absolutely upon his attaining the age of twenty-one years." It is plain from the position of the word "absolutely" between the words "at the time of my death" and the words "upon his attaining the age of twenty-one years," that the latter words form no part of the description of the donee. In other words, it is not for "such one of my sons who shall be the eldest at my death and shall attain the age of twenty-one years," but it is for a donee ascertained at the death, absolutely upon his attaining the age of twenty-one years. Now if it stopped there, it is quite plain that the principle of *In re Francis* (1) would apply, and that I should be compelled to hold that the gift to the eldest son "living at the time of my death" was contingent, and not vested, and liable to be divested. The provision in the will, however, proceeds: "and failing such son." Mr. Pollock has urged that the words "and failing such son" must be read as though they meant, and if such son shall die under twenty-one years of age, then over; and he says, reading it in that way, there is, in effect, the very case which is contemplated by *Phipps* v. *Ackers* (2); and, inasmuch as it must be assumed that the testator intends to give everything to the devisee except what he has given over, the consequence will be that the infant takes a vested interest at the testator's death, liable to be divested on his death under twenty-one. I do not myself think that meaning can be attached to the words. "Failing such son" seems to me to refer back to the description of the donee, "the eldest of

(1) [1905] 2 Ch. 295. (2) 9 Cl. & F. 583.

my sons . . . . who shall be living at the time of my death." The moment the conclusion is arrived at that the reference to age is no part of the description of the donee, I am unable to see how it is possible to import into the words "failing such son" any reference to death under twenty-one at all.

If that is the true view of it, it seems to me that the case is much more on the lines of *Alexander* v. *Alexander* (1), where the devise was to the testator's son Thomas for his life, "and, from and immediately after his decease, I give and devise the same unto the second son of the body of my said son Thomas . . . . on his attaining the age of twenty-one years; but, in default of there being a second son of the body of my said son Thomas," then over. In that case it was held by Jervis C.J., that, in the events which had happened, the gift over did not take effect, and he says (2): "if we could read the will—or that part of it upon which the question turns—as saying, 'I give and devise the same unto the second son of the body of my said son Thomas, lawfully begotten, on his attaining the age of twenty-one years, but, in default of there being a second son who shall attain the said age of twenty-one years,' then over, the construction contended for on the part of the defendant would be the correct construction"; and he comes to the conclusion that those words cannot be read in that way.

I, therefore, come to the conclusion, upon the language of the actual gift itself, that the interest which the son takes is an interest contingent on his attaining twenty-one years, and I find some support for that view elsewhere in the will. In the gift of residue to his children, the testator stated that they are to take in equal shares "and to be an interest or interests absolutely vested on my death." Now he is using the words "absolutely vested on my death" there very much in contrast with the words "absolutely upon his attaining the age of twenty-one years" in the earlier part. I think he is contrasting the two things, and I think that in itself is some indication that in the phrase "absolutely upon his attaining the age of twenty-one years," he is really contemplating a true contingency.

(1) 16 C. B. 59. (2) 16 C. B. 77.

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Then again, when I turn to the maintenance clause, I find a power for the trustees "out of the annual income of the property or share"—obviously going to something beyond residue—"to which any infant shall be entitled or contingently entitled under this my will or any codicil hereto or towards his or her maintenance." If this gift, which is the subject of the present decision, is not a contingent gift, there is, in fact, no contingent gift in the will at all, and that again is some slight indication that the conclusion at which I have arrived upon the clause itself is, in fact, correct. There must, therefore, be a declaration that the son became, on the testator's death, entitled to the real estate contingently on his attaining twenty-one years, and a like declaration in respect of the accumulations of the rents and profits of such real estate.

Solicitors: *Charles Stevens & Drayton.*

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[1924. B. 2426.]

Local Government—"Street"—Building Line—Distance of 700 feet between Houses—No intervening Houses—"Front main Wall of Building"—"On either side thereof"—"In the same Street"—Public Health (Buildings in Streets) Act, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.

By s. 3 of the Public Health (Buildings in Streets) Act, 1888, "it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same."

On April 7, 1924, the defendants deposited with the Birkenhead Corporation plans for the erection of a house and shop on a plot of land of which they were the owners fronting on Hoylake Road, a main road 60 feet wide. The plot of land was situate at the corner of Hoylake Road and Challis Street, both within the borough of Birkenhead. On the eastern side of the plot and at a distance therefrom of 700 feet was a steam laundry erected in and fronting on Hoylake Road, the front main wall of which was set back from the road a distance of 12 feet. The land between the site of the defendants' proposed building and

the laundry was unbuilt upon. According to the deposited plans it was proposed to set back the building from Hoylake Road a distance of 2 feet only. On April 10, 1924, the Corporation disapproved of the plans on the ground that the building was not set back 12 feet from Hoylake Road and that the same was proposed to be erected beyond the front main wall of the laundry. Notwithstanding this disapproval the defendants proceeded to erect their building. Thereupon an action was commenced by the Attorney-General at the relation of the Corporation for an injunction and for a mandatory order. The defendants contended that the laundry was not in the same street as their building or a building on either side of such building within the meaning of s. 3 of the Act of 1888:—

Held, that in order to be a "street" within the meaning of the section there must be a succession of houses and buildings at least on one side of it, with some degree of continuity and proximity, such as would enable the Court, as a question of fact, to hold that what was originally a mere highway had become a street; that tried by that test the part of Hoylake Road between Challis Street on the west and the laundry on the east had not become a street; and, therefore, that the defendants' building and the laundry were not in the same street.

Reg. v. *Fullford* (1864) 33 L. J. (M. C.) 122, 125; *Robinson* v. *Barton-Eccles Local Board* (1883) 8 App. Cas. 798, 801, 809 followed.

Held, also, that the expression "house . . . . on either side thereof" in s. 3 meant a house within some near distance, within some degree of proximity and not one standing a considerable distance away, and, therefore, that even assuming that the part of Hoylake Road in question had become a street, the laundry, being situate at a distance of 700 feet from the defendants' building, could not properly be described as a "house or building on either side" of it within the meaning of the section.

In re Ellis and Ruislip-Northwood Urban Council [1920] 1 K. B. 343 followed.

Dictum of Fry L.J. in *Ravensthorpe Local Board* v. *Hinchcliffe* (1889) 24 Q. B. D. 168, 171 approved and followed.

Decision of MacKinnon J. reversed.

APPEAL from a decision of MacKinnon J.

The Corporation of Birkenhead were the urban authority within the meaning of the Public Health (Buildings in Streets) Act, 1888.

Hoylake Road was a main road of 60 feet wide (including footways), and was the principal road connecting the borough with the outlying districts of Hoylake and West Kirby.

On April 7, 1924, the defendants' architects deposited with the Corporation plans for the erection of a house and shop on a plot of land fronting to Hoylake Road and situate at the corner of Hoylake Road and Challis Street, both within the

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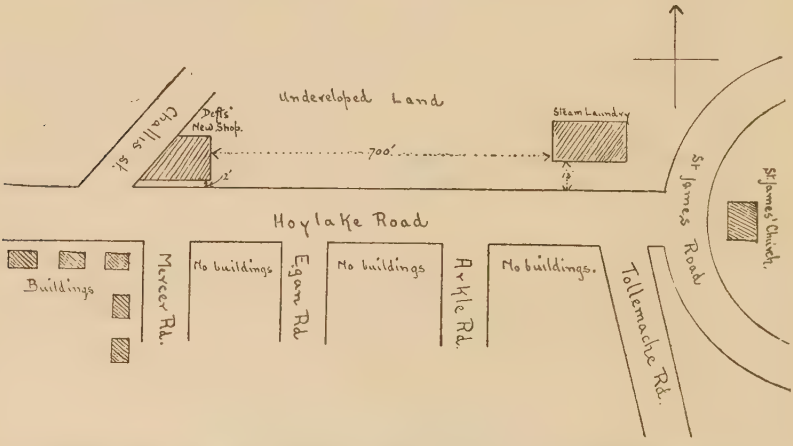
borough of Birkenhead. On the eastern side of the plot of land in question, and at a distance therefrom of 700 feet, there was at the date when the plans were deposited, and still was, a steam laundry and premises erected in and fronting Hoylake Road, the front main wall of which was set back from the road a distance of 12 feet. The land between the site of the proposed house and shop and the laundry was unbuilt upon. According to the deposited plans it was proposed to set back the house and shop from Hoylake Road a distance of 2 feet only. On April 10, 1924, the Corporation disapproved of the plans on the ground that the house and shop were not to be set back 12 feet from Hoylake Road and/or that the same were proposed to be erected beyond the front main wall of the laundry and premises.

The following rough sketch plan shows the relative positions of the buildings in question.



The present action was brought by the Attorney-General at the relation of the Corporation, (1.) for an injunction to restrain the defendants, their servants, agents, and workmen from erecting or causing to be erected upon the plot of land in question the house and shop beyond the line of the front main wall of the laundry, and (2.) for a mandatory order upon the defendants to pull down so much of the house and shop then in course of erection upon the said plot of land as extended beyond the front main wall of the laundry.

By his statement of claim the plaintiff alleged that the laundry was a building on one side of the proposed house and shop within the meaning of s. 3 of the Public Health (Buildings in Streets) Act, 1888.

By their defence the defendants denied that the laundry referred to by the plaintiff was at any material time in the same street as the defendants' house and shop or a building on one side of such house and shop within the meaning of s. 3 of the Act of 1888.

The writ in the action was issued out of the Liverpool District Registry, and by the order of the Registrar the action was directed to be tried by a judge alone at the Liverpool Assizes.

The action was tried by MacKinnon J. without a jury at Liverpool. At the date of the hearing the defendants' house and shop had been completed. His Lordship held that the defendants' house was in the same street as the laundry, and that the laundry was a building on one side of it within s. 3 of the Act of 1888. He accordingly granted a mandatory order against the defendants to pull down as asked for.

The defendants appealed. The appeal was heard on January 28, 29, 30, 1925.

Luxmoore K.C. and *Hugh Gamon* for the appellants. There is no building line in this case, but it is said that the appellants have infringed s. 3 of the Public Health (Buildings in Streets) Act, 1888, which prohibits, without the written consent of the urban authority, the erection of a house "in any street" beyond the front main wall of the house "on either side thereof" in the same street. The appellants contend: (1.) that this part of Hoylake Road is not "a street," and (2.) that the laundry 700 feet away is not "on either side of" their house. "Street" is defined by s. 4 of the Public Health Act, 1875, as including a road, but an interpretation clause of that kind is not meant to prevent the word receiving its ordinary, popular and natural sense whenever that would be properly applicable: Lord Selborne in *Robinson* v.

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Barton-Eccles Local Board. (1) In s. 3 of the Act of 1888 it is submitted that "street" has its ordinary meaning: Stroud's Judicial Dictionary, 2nd ed., vol. iii., p. 1947. To make a street the rows of houses must be continuous: *Reg.* v. *Fullford* (2), and the part of this road where the appellants' house is built is not yet a street, for a road may well become a street in one part and remain a road in another: *Attorney-General* v. *Siddall.* (3) There is a stretch of open undeveloped land between the appellants' house and the laundry for 700 feet.

If the contention that this road is not a "street" within the meaning of s. 3 fails, then the appellants say that the laundry, which is 700 feet away, is not "on either side of" their house; and in support of that contention rely upon *Ravensthorpe Local Board* v. *Hinchcliffe* (4), where Fry L.J. expressed a doubt whether a house could be said to be on either side of another house 300 or 400 feet distant: *Reg.* v. *Middlesbrough Corporation* (5), which is directly in point: *Warren* v. *Mustard* (6); *Attorney-General* v. *Edwards* (7), which shows that all the circumstances must be taken into consideration: *Reg.* v. *Ormesby Local Board of Health* (8); and *In re Ellis and Ruislip-Northwood Urban Council.* (9) If the appellants obeyed this order and pulled down their house, and then bought the laundry, pulled it down and rebuilt it within two feet of the road, they could then rebuild their house again on its old site. That test shows the fallacy of the respondent's contention.

A. T. Miller K.C. and *H. P. Glover* for the respondent. The object of s. 3 was to preserve uniformity: *Attorney-General* v. *Wimbledon House Estate Co.* (10); and it is intended to apply to buildings about to front on existing streets and so provide for the creation of a building line, and in giving this power to a local authority it is assumed that it will be

(1) 8 App. Cas. 798, 800.
(2) 33 L. J. (M. C.) 122.
(3) Times Newspaper, June 24, 1898.
(4) 24 Q. B. D. 168.
(5) Times Newspaper, July 7, 1890.
(6) (1891) 61 L. J. (M. C.) 18.
(7) [1891] 1 Ch. 194.
(8) (1894) 43 W. R. 96.
(9) [1920] 1 K. B. 343.
(10) [1904] 2 Ch. 34, 41.

reasonably administered: *Kruse* v. *Johnson* (1), and exercised with integrity: *Warren* v. *Mustard.* (2)

The fact that there is an area unbuilt upon in the street is not decisive, for s. 3, by referring to the erection of a house, implies that there must be a vacant space. This is an arterial road, and the considerations which apply to rebuilding, apply equally to building on a new site. The test is whether the house in question is "in the same street." If it is, then it does not matter whether the next building on the same side is a mile away. That being the test, the cases relied upon by the appellants do not touch this point, and moreover they are not decisive upon the question in support of which they were cited.

It is submitted that the judge was right in holding that the part of Hoylake Road in question between the defendants' building and the laundry had become a street, and that the question being really one of fact his decision ought not to be interfered with. It is submitted therefore that the defendants' house has been built in breach of the section.

Luxmoore K.C. was not called upon to reply.

POLLOCK M.R. This is an appeal from a judgment of MacKinnon J. which was given by him on November 5, 1924, at the Liverpool Assizes, whereby he granted a mandatory injunction ordering the defendants to pull down a house, which in the course of the proceedings had been completed, upon a site which belonged to one or two of the defendants. The defendants or some of them were the owners of a certain plot of land abutting upon Hoylake Road, and on April 7 the representatives of the defendants, who were minded to build a house and shop at the corner of Hoylake Road and Challis Street within the borough of Birkenhead, deposited plans with the Corporation for the purposes of obtaining their approval. On April 10 the relators disapproved the plans and gave notice of their disapproval to the defendants on April 11, 1924. Notwithstanding that disapproval the defendants indicated that they were

(1) [1898] 2 Q. B. 91. (2) 61 L. J. (M. C.) 18.

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determined to proceed with their plans, and disputed the right of the Corporation to prevent their doing so. It is in these circumstances that the defendants proceeded and built their house and that on July 7 the writ was issued by the Attorney-General on the relation of the Birkenhead Corporation for an injunction to restrain the defendants from building and for a mandatory order to pull down the building which had been completed before trial.

The Birkenhead Corporation are the building authority for the area which belongs to the borough, and at some distance to the west of the main body of the borough there is a church called St. James' Church, built in a circle where a number of roads converge, and one of these roads which passes from that circle is Hoylake Road, a thoroughfare carrying traffic from Birkenhead through Bidston towards Wirral, and there is a boundary, the western point, some distance along the Hoylake road at which the areas of the Birkenhead Corporation and that of another authority become contiguous and the duties of the Birkenhead Corporation cease. The Hoylake Road, although not situate in the most populous part of Birkenhead, is no doubt an important thoroughfare situate as it is in an area which is developing rapidly. There is a small town or village of Bidston, distant about a mile from St. James' Church, and there is on the north and south of Hoylake Road an area of land which can be used both for building and for recreation purposes; but I do not wish to indicate anything more than that Hoylake Road is an important thoroughfare carrying a large amount of traffic westerly from Birkenhead and in an area rapidly developing. As it stands at present, the portion of Hoylake Road in the borough of Birkenhead west of St. James' Church has a certain number of buildings on the north. Not far from St. James' Church there is a steam laundry, which is built so as to leave a space of 12 feet between it and the unflagged footpath on the north of Hoylake Road, and that is the building which along Hoylake Road is nearest to St. James' Church. Still continuing on the north side of Hoylake Road, at a distance of rather more than 700 feet,

nearly 250 yards from the laundry, there is the Bidston Hill Hotel. That hotel has been built for some time and it abuts upon the footpath, which in front of the hotel is flagged. It is not flagged further west. To the west of Bidston Hill Hotel there are some houses which have been put up and which are set back some 20 feet from the footpath. On the south side there are a number of houses which have been built, and apparently during recent years the Corporation have built a number of houses along or on sites not abutting on the south side of Hoylake Road, but those houses are set back from unflagged footpath a certain distance. The site on which the defendants' peccant house has been built is situate at the corner of Challis Street and Hoylake Road. The house has been built abutting upon the unflagged footpath and in that respect it follows the same line as the Bidston Hill Hotel. The Corporation claim first that they were entitled to restrain the building on this site, and are now entitled to a mandatory injunction requiring the defendants to pull down the house and shop, because they have been built contiguous to the footpath whereas they ought to have been set back 12 feet from the footpath. They say that regarding the steam laundry as a building on one side of the house, they are entitled under the powers of the statute and the section to require that that house shall be set back as the laundry is set back, distant as it is 700 feet away.

Now for the purpose of seeing whether or not the Corporation have that power, it is necessary to refer to the legislation which has been passed and which they claim gives them the right to interfere. Sect. 3 of the Public Health (Buildings in Streets) Act, 1888, provides as follows: "Section 156 of the Public Health Act, 1875, is, save as hereinafter mentioned, hereby repealed, and in lieu thereof it is hereby enacted that it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same

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street, nor to build any addition to any house or building beyond the front main wall of the house or building on either side of the same." The Corporation say that having regard to the situation of the laundry, they are by virtue of that s. 3 entitled to insist upon having the defendants' house set back 12 feet from the unflagged footway.

Mr. Luxmoore has called our attention to previous Acts and to the sequence of sections, and perhaps it is useful to refer to them. First of all s. 3 starts by repealing s. 156 of the Public Health Act, 1875. That section differs from s. 156 of the Act of 1875, in that it contains the words "to erect," whereas s. 156 only provided that it should not be lawful in any urban district without the written consent of the urban authority, "to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof." In other words, s. 156 was found to be faulty in this, that it did not deal with a house which was being erected in the first instance, but dealt only with a house which was being re-erected or which was built to replace some former building which had already taken its place in the street. Sect. 3 of the Act of 1888 therefore marks a considerable advance in the powers given to the urban authority. The word "street" which is used in that section is defined by s. 2 of the Act by reference to s. 4 of the Public Health Act, 1875, which defines "street" as including "any highway and any public bridge (not being a county bridge) and any road, lane, footway, square, court, alley or passage whether a thoroughfare or not." It is plain, therefore, that we are to read "street" in s. 3 as including a highway, and Hoylake Road is a highway. But the section does not say that all highways are streets; and the meaning of "street" has still to be sought from a consideration of the circumstances of the case and of a number of authorities.

Before I pass to those authorities I should like to refer first to what I may call the preceding powers which s. 3 of the Act of 1888 replaced. There was in the Local Government Act (1858) Amendment Act, 1861, a section (s. 28)

which provided: "It shall not be lawful at any time or times hereafter, within the district of any local board, to bring forward any house or building forming part of any street, or any part thereof, beyond the front wall of the house or building on either side thereof, nor to build any addition thereto, beyond the front of such house or building on either side of the same as aforesaid, without the previous consent of such local board." It is important, therefore, to note that from the time of the Act of 1861 there has been this power of preventing a house in a street or forming part of a street from being brought forward without the consent of the local board or persons in whom the authority is vested, and this s. 28 or the subsequent section which replaced it, has been considered from time to time and been the subject of judicial decision. It is to be observed that in the present case the Corporation have determined to make or attempted to make use of this section for, in effect, preventing any house being built along Hoylake Road nearer than 12 feet from the unflagged road, and that really for the purpose of prescribing what shall be the line of building on the north side of Hoylake Road. [His Lordship then read evidence of the borough surveyor to the effect that no building line had been fixed or house planning scheme adopted by the Corporation and continued.]

What this Court has to decide is the question of law, whether or not MacKinnon J.'s judgment was correct. I turn, therefore, to a more careful scrutiny of the words of s. 3, and find that what is forbidden without the consent of the urban authority is to erect or bring forward any house or building in any street beyond the front main wall of the house or building on either side thereof in the same street. Now first of all, what is a street? By the section it includes a highway; but turning back to *Reg.* v. *Fullford* (1), decided by the Court of Crown Cases Reserved, upon the consideration of s. 28 of the Act of 1861 one finds some guidance given by the learned judges who took part in that decision. Sir William Erle C.J. there says (2): "I was very desirous that the parties who have to

(1) 33 L. J. (M. C.) 122. (2) Ibid. 125.

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carry this Act into effect should have, from those whose duty it is to interpret it, a definition of what is a street within the meaning of the Act. I think the term street, in this statute, refers to a row of houses, in some degree continuous and in some degree proximate to one another. The whole question is, whether these houses have attained that degree of continuity and proximity ?" Blackburn J. says (1): "The question is, whether the house and building of the defendants formed part of a street, and whether the adjoining houses formed part of it. It is a question of more or less, and therefore a question for the jury. Within the meaning of the Act, houses form part of a street when the houses and buildings on one side are so contiguous as substantially to form a continuous row." He goes on: "Had I to express an opinion respecting one part of this so-called street, I should say that it was a street; but with regard to the particular part where the defendants' house is situate, I think the jury might have well found either way. Had I been a juryman, I am not certain what way I should have found." Pollock C.B. says (1): "If I had to direct the jury in this case, I should tell them that a set of detached houses, not being in a continuous line, and some facing one way and some another, and having no appearance of uniformity at all, was not a street within the meaning of this Act of Parliament."

Now I read those passages, because it appears to me that upon the predecessor of s. 3 it was determined by a Court of great authority that in order to come within the term "street" one has to find a succession of houses and buildings, at least on one side, with some degree of continuity and proximity. If this is so, it becomes a question of fact whether a street has been built, and that what was a mere highway has become a street.

In *Robinson* v. *Barton-Eccles Local Board* (2) the question of by-laws made under s. 157 of the Public Health Act, 1875, relating to a new street and to its width and construction was considered. Lord Selborne, dealing with the word "street," says (3): "In the natural and popular sense of the

(1) 33 L. J. (M. C.) 125. (2) 8 App. Cas. 798. (3) Ibid. 801.

word 'street,' or the words 'new street,' I should certainly understand a roadway with buildings on each side (it is not necessary to say how far they must, or may be, continuous or discontinuous); and by 'new street,' a place which before had not that character, but which, by the construction of buildings on each side, or possibly on one side, has acquired it."

Now reading those passages it appears to me that what one has to find before one can determine that the highway in question is a street, is that the highway has become a street in the ordinary acceptation of that word, because by reason of the number of the houses, their continuity and their proximity to one another, what would be a road or a highway has been converted into a street. That is a question of degree. More than that, it appears from *Reg.* v. *Fullford* (1), and indeed it is accepted by the respondent, that there may be a road which is a street in one part and not in another. It is all, therefore, a question of fact.

I come now to consider whether or not Hoylake Road is, at the material part, a street. The facts are simple. The footpath on the north side is unflagged; there is only, between Challis Street and St. James' Church, other than the defendants' house, one building—namely, the steam laundry—and between the defendants' house and the steam laundry there is a distance of 700 feet on which there are no buildings at all. Speaking for myself, though it is not essential to the decision of this case, I should, without difficulty, hold that at this point Hoylake Road had not become a street. I agree with what Blackburn J. said in *Reg.* v. *Fullford* (1), that houses on one side will be enough; it is not necessary that there should be buildings on both sides of it.

Assuming however that Hoylake Road is a street, we have to find whether the house in question has been erected or brought forward beyond the front main wall of the house or building on either side thereof in the main street. Now again, what is meant by "on either side thereof"? Can

(1) 33 L. J. (M. C.) 122.

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one say that the laundry is a building on the side of the defendants' house ?

In *Ravensthorpe Local Board* v. *Hinchcliffe* (1) Fry L.J. and Mathew J., sitting as a Divisional Court, had to consider whether or not a house of which the footings were only then put in was a house which offended against s. 3, and Fry L.J. said that there was no front main wall of a house or building, and he decided the case on that ground avowedly ; but he added (2) : " There is another point in the case upon which I have not formed such a strong opinion. The Act forbids the erecting any house or building or any part thereof, beyond the front main wall of the house, etc., on either side thereof in the same street. I think that the expression ' house ' . . . . on either side thereof,' means a house within some near distance, within some degree of proximity, and not one standing some considerable distance away. Burton's house was 300 or 400 feet distant from Hinchcliffe's, and I doubt whether it could be said to be on either side of Hinchcliffe's within the meaning of the section."

Now it is said those observations are obiter. I do not care to inquire whether they are to be treated merely as obiter or as part of the judgment. It is sufficient for my purpose to say that they are the dicta of Fry L.J., concurred in by Mathew J., after an argument as to the meaning of the section. Nor do I forget that in using the phrases he does, he brings in his definition and view of the section, and it is in accord with *Reg.* v. *Fullford.* (3)

The next case in which the point arose for determination was *Warren* v. *Mustard* (4), in which Mathew J. again was one of the judges, and again the same s. 3 of the Act of 1888 was considered. In that case, which was an appeal from the justices, upon a case stated under the Act of 1879, no question of fact was open to the Court ; they could only deal with the question of law. The Court came to the conclusion that there was evidence before the justices upon which they could decide as they did. Mathew J. once more says that the

(1) 24 Q. B. D. 168.
(2) Ibid. 171.
(3) 33 L. J. (M. C.) 122.
(4) 61 L. J. (M. C.) 18.

question in these cases is one of fact (1): "Can we say as a matter of law that a house sixty-four feet distant from another is not on one side of that other house? It may be that only houses standing in rows or semi-detached from one another were contemplated by the Legislature in passing this statute; but the Act also applies to houses at a little distance from one another." And A. L. Smith J. refers (2) to what was said by Fry L.J. and concurred in by Mathew J. in *Ravensthorpe Local Board* v. *Hinchcliffe* (3), and approves of what they had said. The respondent says you find there a decision that the justices were right in the view that they took of the facts and that they convicted the persons against whom the proceedings were taken. To my mind it is of importance to observe that after argument both Mathew and A. L. Smith JJ. took the same view as was taken by Fry L.J. in the previous case, and the case adds another measure to the sequence, if you like, of the dicta already expended upon the section.

The question then came before Romer J. in *Attorney-General* v. *Edwards* (4), which is in agreement with the sequence of dicta or judgments, whichever you prefer to call them, presented in the other cases.

In 1894 a decision was given by Mathew and Kennedy JJ. in *Reg.* v. *Ormesby Local Board of Health* (5), the question being whether or not there was in the same street a building on one side of the proposed building, there being a considerable distance, I think something like 70 feet, between the two buildings. Mathew J. says (6): "I can only say that it appears to me that there is no evidence of the existence, on the side of the original building and in the same street, of what is necessary under this Act. There is no evidence of the existence of any house on either side of the original construction and in the same street with it."

Lastly, we come to *In re Ellis and Ruislip-Northwood Urban Council* (7), which was decided in this Court. This case

(1) 61 L. J. (M. C.) 20.
(2) Ibid. 21.
(3) 24 Q. B. D. 168.
(4) [1891] 1 Ch. 194.
(5) 43 W. R. 96.
(6) Ibid. 97.
(7) [1920] 1 K. B. 343.

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is a little difficult to understand, but when one has appreciated what had to be determined, it comes to this. There was a claim made for compensation, which went before an arbitrator, and the answer to the claim was that no compensation ought to be paid to a person who built a house without the leave of the urban authority on a site without leaving a sufficient margin as he ought to have done, and could have been forced to do, under this same s. 3. Scrutton L.J., in dealing with the words "beyond the main front wall of the house on either side," in s. 3, says (1): "Some limitation, a limitation of fact, must be placed on the words 'on either side,' but it is clear that houses on some undefined length of Mr. Ellis's frontage would have the Southern Shop on one side of them, and would project beyond the main front of the Southern Shop, and therefore be illegal." He agrees that the mere fact that you find at any distance a house which is built to the right or to the left of the building in question is not enough without bringing your mind to bear upon the question whether or not the proximity and indeed the continuity of the street have been properly considered by those who have to administer the section.

Now having looked at all those cases (and I think I have dealt with all that are immediately relevant to the point) I agree with the stream of dicta—for my part I think in some cases they amount to authority—which has been expressed with regard to this section. It is true that, except in the last case that I have referred to, there is no case of a decision binding upon this Court, but I agree with what has been said in the case to which I last referred, and in the other cases and by the other judges. It appears to me that in construing this section you must have regard to all the circumstances of the case, and it is a question of fact whether or not there is another house on either side of the building in question and in the same street. If you find that the house relied upon is so far distant that no person in ordinary parlance would say that it was the next house in the same

(1) [1920] 1 K. B. 371.

street, you cannot hold that the section has been transgressed. There must be some reasonable measure of continuity and proximity in order to find that there is a house on either side to which the house in question must conform. In the present case the intervening space is so great between the laundry and the defendants' premises, that I do not think that s. 3 applied. It appears to me that MacKinnon J., who did not have the last case that I have cited brought to his attention, and perhaps had not the opportunity of as full a consideration of the cases as we have had, has misapplied the law and come to a conclusion upon the facts after misdirecting himself in point of law. Inasmuch as I think he did so misdirect himself, although one pays every respect to his conclusion of fact, I think that his conclusion of fact is not in any sense binding upon the Court as would be a finding of the justices where a case comes on appeal by way of case stated, and we are entitled to go into the facts, particularly where they are presented, as they are substantially in this case, upon documents.

For the reason which I have given, and upon the authorities which I have referred to, I have come to the conclusion that s. 3 does not apply in the circumstances of this case, and, therefore, that the order made ought to be discharged, and the appeal allowed with costs.

SARGANT L.J. I am of the same opinion. There are two questions which this Court has to decide: first, whether the laundry and what has been called the incriminated building, that is to say, the recently erected shop, are in the same street within the meaning of s. 3 of the Public Health (Buildings in Streets) Act, 1888, and, secondly, whether, if they are in the same street, the incriminated building is on the side of the laundry within the meaning of the same section. Now it is material to notice that the legislation invoked by the relators in the present case is not legislation for turning an existing road into a well-designed street, but has a much more limited scope. It seems to me only to deal with cases where there is already an existing street, although the word

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"existing" is not actually used; that is, it postulates a street. The original section, namely s. 156 of the Public Health Act, 1875, was held to deal only with cases where an existing building in an existing street was being replaced by a new building. That was so held in *Williams* v. *Wallasey Local Board* (1), and s. 3 of the Act of 1888 only enlarged the operation of s. 156 by including within it a site which so far had had no building on it. The requirement that the new building must be within an existing street was in no way relaxed. The problem under this legislation is, in my judgment, a static one and not a dynamic one; it is quite different from the problem under later Acts as to town planning and development, and it is to be noted that the evidence of the borough surveyor, both that quoted by my Lord and other evidence read to us to-day, was obviously directed in the main to this last dynamic problem, of turning a road into a well-constructed street, and not to the static problem under the earlier legislation.

The first point, therefore, is: Are these two buildings in the same street? Counsel for the respondent agreed with counsel for the appellants in this, that "street" has to be construed in its ordinary meaning, and that the words "on either side thereof" are also to be construed in their ordinary meaning; and it has been long since held in *Reg.* v. *Fullford* (2), which was decided not under the same legislation but under legislation of a similar character, and practically identical in substance on this point, that a road might be a street in one part and not in another, and that a street in the ordinary sense and in the statutory sense meant prima facie a road with more or less continuous buildings, at any rate on one side of the road. The same view was taken in *Attorney-General* v. *Siddall.* (3) In that case the Court held that the question whether a road was a street was one of fact and also one of degree, and that the road in question was clearly a street, though at one end it was a country road.

That being so, the question being one of fact, it seems to me

(1) (1886) 16 Q. B. D. 718. (2) 33 L. J. (M. C.) 122.
(3) Times Newspaper, June 24, 1898.

that we are practically in as good a position to determine the question of fact as was the learned judge. The question depends not on the credibility of witnesses, or anything of that kind, but upon the relative positions of these two buildings and the other buildings in or near this road. Looking at the plan I agree that the road was probably a street down to the point at which it reached St. James' Church, and perhaps for a short distance further; and again further to the west when it reached the Bidston Hill Hotel and thereafter for some distance, I do not know how long, the road again was probably a street. But for something like 700 or 800 feet from the western side of the laundry there are no buildings at all on the north side of the street, and the footpath is unflagged on that side; and on the south side, for very much the greater part of that distance, there are no buildings which front on to or have access to this road. There are certain buildings along various roads, Mercer Road, Egan Road and Arkle Road, which diverge from the Hoylake Road; it may be that those roads are streets, but I do not think any inference is to be drawn from that circumstance as to Hoylake Road being a street. In my judgment the portion of the road from Challis Street to the steam laundry, or at any rate to a point some 100 feet west of the steam laundry, is a road and not a street, and that although at either end the same highway may have acquired the nature of a street.

But then comes the second question. Even assuming that this is a street so that the shop and laundry are in the same street, can it properly be said that the shop is on the side of the laundry within the meaning of the section? Now here the learned judge formed a strong view, which he maintained to the end of his judgment, that when once you have decided that the two buildings were in the same street there really was no second question at all; that if the gap between the houses was not sufficient to prevent them being in the same street, it must necessarily follow that a house was on the side of that building which was the next building along the road or along the street in question. He says that really in terms

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before he comes to examine the cases, and that is the conclusion at which he ultimately arrived. Now in my judgment there is long line of authority which is absolutely and entirely opposed to that view. All through some half-dozen or more cases, without any case in any way to the contrary, it has been held that there is a second question to be determined—namely, whether, although two buildings may be in the same street, they are in such a position relative to one another that one can be said to be on the side of the other: and one, and I think the most material circumstance which has been looked at in these cases for the purpose of determining that question, is the proximity of the two buildings to each other. The first case in which the point was dealt with was *Ravensthorpe Local Board* v. *Hinchcliffe* (1), in which Fry L.J., sitting with Mathew J. as a Divisional Court, dealt with this point as a completely separate point and expressed his view of it, although it was not the principal or main reason for which he arrived at the conclusion he did. That case was decided in December, 1889, and immediately after, in *Reg.* v. *Middlesbrough Corporation* (2), decided in July, 1890, the Divisional Court took the same view, that there was this separate point to be considered. They said this: "The case was clear. The new road was not yet a street, and there were no houses on 'either side of it.'" In that case there was a distance of something like 800 feet. So that they dealt with the second point as being a second point. The same was the case in *Warren* v. *Mustard* (3), to which my Lord has also referred, and in *Attorney-General* v. *Edwards*. (4) The same was also the case in *Reg.* v. *Ormesby Local Board of Health*. (5) All through, whether by way of decision or by way of recognition of views previously expressed, the Courts have held that although two buildings may be in the same street and have no intervening buildings, it by no means necessarily follows that the two buildings can be said to be on the side of each other. There may be such an intervening space or such

(1) 24 Q. B. D. 168.
(2) Times Newspaper, July 7, 1890.
(3) 61 L. J. (M. C.) 18.
(4) [1891] 1 Ch. 194.
(5) 43 W. R. 96.

other circumstances as, while not sufficient to prevent the street being the same street, are amply sufficient to prevent the one house being properly said in ordinary language to be on the side of the other.

Finally there is the very important case of *In re Ellis and Ruislip-Northwood Urban Council* (1), in which the point was definitely decided by the Court of Appeal. In that case the appellant was the owner of a strip of land in the same street in which there were two buildings. On the north there was a public-house and on the south there was what was called the Southern Shop, and the Southern Shop stood back a certain distance from the road. The appellant was building at the northern end of his strip of land, adjoining the public-house, but 400 feet or thereabouts from the Southern Shop, and he was building on a frontage nearer the road than the Southern Shop. The question arose whether he was to be compensated in respect of his land under the Town Planning Acts, and for that purpose it was necessary to determine whether he was prohibited from building in the way proposed under the legislation we have now to consider, which does not make any provision for compensation. If he was prevented under this legislation then the arbitrator was not entitled to award him compensation under the Town Planning Acts. The Court definitely took the view — it is expressly stated by Bankes and Scrutton L.JJ.—that the arbitrator ought to have considered down to what point south or up to what point north along his strip of land he was disentitled to build with a set-back less than that of the Southern Shop; which clearly shows that they thought that the question whether the new buildings which would be on the southern side of the shop within the meaning of the legislation was a question to be determined mainly by the proximity of the new buildings to the Southern Shop.

In that state of things it seems to me that we must disagree with the learned judge in coming to a conclusion that there really was no separate question. I think there

(1) [1920] 1 K. B. 343.

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was a separate question here, and that, as a matter of ordinary language, when you look at this plan, and when you consider that this steam laundry is 700 feet away, and that there is a recreation ground intervening, it is impossible to speak of this new house and shop being by the side of the laundry, or on the side of the laundry, or at the side of the laundry. I do not think it would come within the ordinary meaning of that phrase as used in the English language: the two buildings are so entirely remote from and independent of one another, by reason of the great distance by which they are separated, that in my judgment no person would say that the house and shop were on the side of the steam laundry. In my judgment, therefore, the learned judge was wrong in the conclusion to which he came, and the appeal ought to be allowed with costs.

ASTBURY J. I am also of opinion that this appeal must be allowed, and I further agree that there are two separate and distinct questions which have to be answered in order to decide the matter under the section in question. With regard to the first question, whether under all the circumstances of this case the house in question is a house in a street within the meaning of the section, I feel some doubt, and I do not propose to discuss the matter. With regard to the second question, whether this laundry is a building on one side of the house in question, I agree entirely with what has been said by my Lord and Sargant L.J., but as we are differing from the learned judge in the Court below, I should like to add just a word upon it. This section is one depriving an owner of land of what, apart from it, would be one of his rights of dominion, and I think it must be strictly construed. The question is, what is the meaning of a building on either side of a house in the same street? The learned judge in the Court below, after holding that this is a house in a street, appears to me practically to have come to the conclusion that that settled the whole matter. Now there are clear dicta and judgments of about ten or twelve different judges, upon the meaning of this particular section. They every

one of them, as I understand them, diametrically differ from the conclusion arrived at by the learned judge in the Court below. Those cases have been fully referred to and I do not propose to deal with them at any length, but I would say this: in *Ravensthorpe Local Board* v. *Hinchcliffe* (1) the distance was 300 to 400 feet; in *Reg.* v. *Middlesbrough Corporation* (2) the distance was 800 feet; in *Warren* v. *Mustard* (3) the distance was 64 feet; in *Attorney-General* v. *Edwards* (4) the distance was 57 feet; in *Reg.* v. *Ormesby Local Board of Health* (5) it was 70 to 90 feet; and in *In re Ellis and Ruislip-Northwood Urban Council* (6) it was 420 feet. Now within that range the views expressed in the authorities seem to me absolutely plain and clear. Fry L.J. in the first case said (7): "I think that the expression 'house . . . . on either side thereof' means a house within some near distance, within some degree of proximity, and not one standing some considerable distance away." Some judges have thought 50 or 60 feet was a considerable distance, but there is no case in the slightest degree questioning this continuous stream of view or authority, that this section must be construed with regard to houses that are reasonably proximate the one to the other. The respondent has been forced to admit that, if he is right, a distance of half a mile or even a mile would not prevent sufficient proximity being allowed to exist under this section. I think that is absolutely and entirely contrary to the whole trend of authority, and for these reasons and those that have been much better expressed by other members of the Court, I think this appeal ought to be allowed.

Appeal allowed.

Solicitors for appellants: *Field, Roscoe & Co., for Oliver Jones, Billson & Co., Liverpool.*

Solicitors for respondent: *F. Venn & Co., for E. W. Tame, Town Clerk, Birkenhead.*

(1) 24 Q. B. D. 168.
(2) Times Newspaper, July 7, 1890.
(3) 61 L. J. (M. C.) 18.
(4) [1891] 1 Ch. 194.
(5) 43 W. R. 96.
(6) [1920] 1 K. B. 343.
(7) 24 Q. B. D. 168, 171.

W. I. C.

EVE J.

1924

Nov. 12;
Dec. 17, 18.

1925

March 23.

In re JONES.

JOHNSON *v.* ATTORNEY-GENERAL.

[1922. J. 1860.]

Will—Construction—Executor—Personal Estate—Failure of residuary Bequest—No Next of Kin—Beneficial Right of Executor—Presumption—Contrary Intention—Crown taking as Bona vacantia—Executors Act, 1830 (11 *Geo.* 4 *and* 1 *Will.* 4, *c.* 40), *preamble.*

By his will dated January 27, 1913, a testator appointed his wife M. J. and the plaintiff J. E. J. to be his executors, and after directing them to pay his debts, and funeral and testamentary expenses, bequeathed all his estate and effects, real and personal, which he might die possessed of, to his wife M. J. absolutely. M. J. predeceased testator and died on August 14, 1919. The testator died on December 30, 1920, leaving real and personal property, but no heir at law or next of kin. It was admitted that the real estate passed to the Crown.

On a summons to ascertain who was entitled to the personal estate:—

Held, that there was in the will an obvious indication of an intention by the testator that the executor was not to take beneficially. He was in the position of a trustee, and on failure of a cestui que trust the beneficial interest in the personal estate vested in the Crown as bona vacantia.

Bennet v. *Batchelor* (1789) 3 Bro. C. C. 28 and *Bishop of Cloyne* v. *Young* (1750) 2 Ves. Sen. 91 followed.

ADJOURNED SUMMONS.

By his will dated January 27, 1913, John Jones, of 14 Park Place, Upper Eastville, in the county of Bristol, after appointing the plaintiff, John Evan Johnson, and his (the testator's) wife, Maria Jones, to be his executors, directed as follows: "I direct my executors to pay my just debts, and funeral, and testamentary expenses. I give and bequeath all my estate and effects, real and personal, which I may die possessed of or entitled to, unto my wife Maria Jones absolutely." Maria Jones died on August 14, 1919, in the lifetime of the testator. The testator died on December 30, 1920, and his will was proved by the plaintiff, the surviving executor, on May 20, 1921. The testator left no issue and was believed to have no heir at law or next of kin. He was entitled at the time of his death to real estate valued for probate at 250*l.*, and to personal estate valued at 870*l.* 18*s.* 9*d.* On June 12, 1922, the plaintiff issued an originating summons

asking that (1.) an inquiry might be directed who, upon the death of the testator, became by virtue of or according to the Statutes of Distribution, beneficially entitled to any personal estate as to which he died intestate; (2.) an inquiry who, upon the death of the testator, became beneficially entitled to any real estate of his, as to which he died intestate; and (3.) that in case it should be certified that the testator died without any next of kin it might be determined whether the plaintiff as the surviving executor of the will, or His Majesty the King in right of His Crown, was beneficially entitled to the residuary personal estate. By an order made by Romer J. in chambers it was ordered that the two inquiries asked for should be directed, and the rest of the summons was directed to stand over. By the Master's certificate, dated June 26, 1924, he certified (1.) that no person became, according to the Statutes of Distribution, beneficially entitled to the personal estate of the testator in view of the fact that he died without leaving any next of kin; and (2.) that no person had come in and proved any claim to have become beneficially entitled to any real estate of the testator. It was not disputed that the Crown became entitled to the real estate. The further question raised by the summons now came before the Court, whether the plaintiff, as surviving executor, or the Crown, became entitled to the residuary personal estate.

Stafford Crossman for plaintiff. In the circumstances of this case, there being no next of kin of the testator, the executor is entitled beneficially to the residuary personalty. The question is whether any intention can be implied from the terms of the will indicating that the executor was not to take beneficially. There is no authority which holds that the Crown is entitled where there is no express intention indicated, and here no trust can be implied in favour of the next of kin, as there are none.

The Executors Act, 1830, 11 Geo. 4 and 1 Will. 4, c. 40, only applies as between an executor and the next of kin and therefore does not apply here, as there is no person entitled

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under the Statutes of Distribution. The recital to that Act states the law as it existed before and is the law now—namely, that where a testator has appointed executors without any express disposition of the residue of his personal estate, the executors are entitled to the whole of such residue for their own use, unless it appeared to be the testator's intention to exclude them from the beneficial interest. It is submitted that the Court of equity never exercises its jurisdiction to imply a trust, except in favour of the next of kin as against the executor, and will not do so in favour of the Crown. There is a legal title in the executor where there has been no disposition of the residue, or one that has failed.

The chief case where, in the absence of any next of kin, the executor has been held to take beneficially, is *In re Glukman* (1), and, on appeal, *Attorney-General* v. *Jefferys*. (2) In this case Lord Macnaghten refers to *Mapp* v. *Elcock* (3), where Lord Cottenham made a clear statement of the law as to the title of an executor to undisposed of personalty which arises from the operation of law incident to the office. In *Bennet* v. *Batchelor* (4) it was held that in the case of a lapsed gift the executors were trustees for the next of kin. But that question does not arise here, and the Crown is claiming not under any trust, but as bona vacantia. Other cases on the point of the right of the Crown are *Walker* v. *Denne* (5) and *In re Higginson and Dean* (6), where on the dissolution of a corporation the proceeds of th[illegible]ares in the hands of the official receiver as trustee in bankruptcy were held to pass to the Crown as bona vacantia.

In *Powell* v. *Merrett* (7), which may be relied on for the Attorney-General, there was an express trust for sale in the executors; that distinguishes it from the present case, where there is no such trust. Prima facie, therefore, the executor takes by his legal title in the absence of any express or implied trust, or any indication of a contrary intention:

(1) [1908] 1 Ch. 552.
(2) [1908] A. C. 411, 415.
(3) (1849) 2 Ph. 793, 796.
(4) 3 Bro. C. C. 28.
(5) (1793) 2 Ves. Jun. 169.
(6) [1899] 1 Q. B. 325, 329.
(7) (1853) 1 Sm. & Giff. 381.

Lord Halsbury's Laws of England, vol. xi., p. 28; Hawkins on Wills, 2nd ed., p. 364.

Dighton Pollock for the Attorney-General. The question is not really one of equity or implied trust. The Crown claims title to this residue as bona vacantia: *Powell* v. *Merrett* (1); *Read* v. *Stedman* (2); *Taylor* v. *Haygarth.* (3)

On the construction of this will the executor has duties to perform under it; there is a trust in the direction to the executors to pay debts and funeral and testamentary expenses, and in every case where there are no next of kin the Crown takes as bona vacantia. According to the definition of bona vacantia in Blackstone's Commentaries, vol. i., p. 298, they are "goods in which no one else can claim a property": *Middleton* v. *Spicer.* (4)

Further, there is no beneficial interest in the executor in undisposed of personalty where there has been a contrary intention expressed by the testator as here: Theobald on Wills, 7th ed., pp. 796, 797; *Androvin* v. *Poilblanc* (5); *Braddon* v. *Farrand* (6); *Giraud* v. *Hanbury* (7); *Lord North and Guildford* v. *Purdon* (8); *Bishop of Cloyne* v. *Young.* (9) There is a presumption, therefore, that there is no beneficial interest in the executor to this undisposed of personal estate. He is excluded on the ground that there is a clear intention shown by the testator to dispose of the residue to his wife: *Mordaunt* v. *Hussey* (10); *Starkey* v. *Brook* (11); *Mence* v. *Mence* (12); *Urquhart* v. *King* (13); *Lord Cranley* v. *Hale.* (14)

Stafford Crossman in reply. All these cases in which the Crown has taken are inapplicable, because in each there has been an express trust. There has been no case decided where a trust has been implied in favour of the Crown, or where the Crown has taken on account of a presumption that the

(1) 1 Sm. & Giff. 381.
(2) (1859) 26 Beav. 495.
(3) (1844) 14 Sim. 8.
(4) (1783) 1 Bro. C. C. 201.
(5) (1745) 3 Atk. 298.
(6) (1827) 4 Russ. 87.
(7) (1817) 3 Mer. 150.
(8) (1752) 2 Ves. Sen. 495.
(9) 2 Ves. Sen. 91.
(10) (1793) 4 Ves. 117.
(11) (1717) 1 P. Wms. 390.
(12) (1811) 18 Ves. 348.
(13) (1802) 7 Ves. 225.
(14) (1807) 14 Ves. 307.

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executor was not entitled to take beneficially. Underhill on Trusts, 4th ed., pp. 246, 247; *Middleton* v. *Spicer* (1); and *Dyke* v. *Walford* (2), in which the doubt was expressed whether a trust could be raised in favour of the Crown by implication. That has never been decided.

Cur. adv. vult.

1925. March 23. EVE J. [after stating the facts, continued]: The question I have to answer is whether the executor or the Crown is beneficially entitled to the testator's personal estate.

The Executors Act, 1830, which makes executors of undisposed of personalty trustees thereof for the next of kin has no application to cases like the present, where there are no next of kin, and the question here raised must be decided according to the law apart from that statute. According to Lord Macnaghten a very clear statement of that law is to be found in the case of *Mapp* v. *Elcock* (3), where Lord Cottenham says: "It must be borne in mind, that the title of an executor to personalty not otherwise disposed of, did not arise from any gift of the testator, but from the operation of law incident to the office. The law vested the property in the executor, and if the testator had not directly or indirectly declared any purpose to which he was to apply it, there was nothing to interfere with the legal title of the executor, and he therefore retained such property for his own benefit; but this result, being, as was supposed, generally unforeseen and not intended by the testator, equity considered many circumstances as indicative of an intention contrary to the claim, and, when they were found in the will, declared the executor trustee for the next of kin." The first point therefore to consider is whether there is anything in this will indicative of an intention on the part of the testator that the executor is not to take beneficially. Obviously there is, the residue is destined for Maria Jones, and the fact that the bequest lapsed by reason of her death in the testator's lifetime cannot

(1) 1 Bro. C. C. 201. (2) (1848) 5 Moo. P. C. 434, 496.
(3) 2 Ph. 793, 796.

alter the intent. Authority for these propositions is to be found in *Bennet* v. *Batchelor* (1) and *Bishop of Cloyne* v. *Young*. (2) In the former of these cases Lord Chancellor Thurlow says: "Wherever the testator has, by the same instrument by which he appoints executors, given everything away from them to a stranger, that must shew he meant them only to take as trustees," and in the latter Lord Hardwicke's words are: "This residuary clause shews an intent to dispose of it in some other manner, though imperfect, so that it cannot go to the executor, as that would be contrary to the intent." What is the result? The executor is by the will made a trustee, not a beneficiary, and so remains. Lord Hardwicke put it thus: "An executor must take by the will and therefore if at making the will the intent appears that the executor should not take the beneficial interest in the surplus no accident afterward can give it him."

In these circumstances what is the position of the plaintiff? He is a trustee of this money, and claiming to retain it because there is no beneficial owner forthcoming. That is in my opinion an impossible position. On failure of a cestui que trust the beneficial interest vests in the Crown as bona vacantia. In so deciding I do not think I am raising any implied trust in favour of the Crown. The character of trustee is affixed to the executor by the will, and is not altered by the accident that there is no cestui que trust to take beneficially.

Solicitors: *Hedley Norris & Co., for George John Hobbs, Bristol; The Solicitor to the Treasury.*

(1) 3 Bro. C. C. 28. (2) 2 Ves. Sen. 91, 99.

G. M.

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March 24.

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[1925. N. 404.]

Company—Resolutions passed at General Meeting—Confirmatory Meeting called within a Month—Meeting adjourned for bona fide Reasons—Adjourned Meeting not held within a Month of first Meeting—Confirmatory Resolutions passed at adjourned Meeting—Validity of Resolutions—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 69, *sub-s.* 2.

Where a meeting, held for the purpose of confirming as special resolutions, resolutions passed as extraordinary resolutions at a meeting held less than a month before, is adjourned, for bona fide reasons, to a date more than a month from the date of the meeting at which the resolutions were passed, and the resolutions are confirmed at the adjourned meeting, they are valid within the meaning of s. 69, sub-s. 2, of the Companies (Consolidated) Act, 1908, which provided that: "A resolution shall be a special resolution when it has been—(*a*) passed in manner required for the passing of an extraordinary resolution; and (*b*) confirmed by a majority of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at a subsequent general meeting, of which notice has been duly given, and held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting."

THIS was a motion by a shareholder in the company to restrain the company from acting upon special resolutions for voluntary liquidation and the appointment of liquidators, and to restrain the liquidators from carrying out an agreement, dated February 28, 1924, for the sale of the business and assets of the company to an American company. There was a supplemental agreement, dated May 27, 1924, whereby the purchasing company purported to waive certain rights it had acquired under the principal agreement. By a notice dated August 16, 1924, an extraordinary general meeting of the company was convened for August 25 for the purpose of passing as extraordinary resolutions the three resolutions therein set out. The notice also stated that a second extraordinary general meeting would be held on September 10 for the purpose of confirming as [illegible]olutions the resolutions passed as extraordinary resolutions on August 25. The resolutions were duly passed at the meeting held on August 25.

At the date of the confirmatory meeting of September 10 the supplemental agreement had not been executed by the purchasing company, and the defendant company was advised that it could not go into liquidation unless the purchasing company waived its rights. The meeting was therefore adjourned until October 10 to enable the company to obtain the waiver of these rights. On October 4 the company received a cable from the purchasing company stating that the directors of the company had passed resolutions waiving their rights, and consented to the defendant company going into liquidation. At the meeting held on October 10 the resolutions passed as extraordinary resolutions on August 25 were confirmed as special resolutions. This motion, which was treated as the trial of the action, raised the question whether the resolutions were valid within the meaning of s. 69, sub-s. 2, of the Companies (Consolidated) Act, 1908.

Topham K.C. and *Heckscher* for the plaintiff. The question is whether these resolutions are, in view of the facts in this case, valid. The point is dealt with directly in Stiebel's Company Law, 2nd ed., p. 469, where the opinion is expressed that the special resolutions and the confirmatory resolutions must be actually passed at an interval of not less than fourteen days or more than one month from one another. The point arose but was not argued in *Wall* v. *London and Northern Assets Corporation* (1) and *Thomson* v. *Henderson's Transvaal Estates, Ld.* (2) It has been held for many purposes that an adjourned meeting is a continuation of the original meeting. The question is whether that holds good in the case of a meeting called for the purpose of confirming resolutions passed as special resolutions. If it can be done, then the confirmatory meeting might be adjourned for six months or a year, thereby rendering the passing of the special resolutions a farce. *Scadding* v. *Lorant* (3) was a case of an adjourned vestry meeting, and ought not to apply to the meeting we are dealing with. In *McLar[illegible]omson* (4) an adjourned meeting

(1) [1898] 2 Ch. 469.
(2) [1908] 1 Ch. 765.
(3) (1851) 3 H. L. C. 418.
(4) [1917] 2 Ch. 41, 261.

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of an ordinary general meeting was held to be a continuation of the original meeting. These cases, however, do not deal with s. 69, sub-s. 2, and are not in point here. In *Catesby* v. *Burnett* (1) the date of the election of directors was held to be the date of the adjourned meeting. So here the date on which the special resolutions were confirmed was the date of the adjourned meeting, and that was more than one month from the date on which they were passed.

Ward Coldridge K.C. and *L. W. Byrne* for the defendants.

ASTBURY J. This is a motion in an action which has been brought to determine whether certain resolutions passed by the company are valid and effectual. The matter is brought in a friendly way to test the validity of these resolutions, and the parties agree that this motion shall be treated as the trial of the action.

The confirmatory meeting called for September 10 was duly held, and it was adjourned, perfectly bona fide, to October 10, for the purpose of obtaining certain information from America. The sole question in the action is whether the confirmatory resolutions were valid, having regard to s. 69, sub-s. 2, of the Companies (Consolidation) Act, 1908. In this case the confirmatory resolutions were passed after an interval of considerably more than one month from the date of the first meeting on August 25, but they were passed at an adjournment of a meeting which was duly summoned on September 10, and held on that date, that date being plainly within the time provided for in the statute. The only question which I have to decide is whether the resolutions passed at the confirmatory meeting in fact on October 10 were resolutions which must be deemed to have been passed at the meeting of September 10. In *Scadding* v. *Lorant* (2) a similar matter was discussed and decided with regard to a vestry meeting. The headnote is this: "Where notice of the purpose of a vestry meeting has been duly given, and that meeting has begun but not completed a certain business, and the meeting is regularly adjourned, such business may lawfully be completed

(1) [1916] 2 Ch. 325. (2) 3 H. L. C. 418.

at the adjourned meeting, though the notice for summoning such adjourned meeting does not state the purpose for which it is summoned." In that case the judges were called in to advise the House, and they unanimously came to this conclusion (1): "We think it was sufficient to give notice on the church door of the purpose for which the first meeting was to assemble, and that that notice extended to all the adjourned meetings, such adjourned meetings being for the purpose of completing the unfinished business of the previous meetings, and all being in continuation of the first meeting"; and the Lord Chancellor, in giving the judgment of the House, said (2): "As it now appears, by the opinions of the learned judges, given unanimously, that the adjourned meetings were to be considered as a continuation of the first meeting, and that the first meeting was duly convened; that answers the objection, which appears to have more of substance in it than any other." That case has been frequently discussed and referred to since, and in an action of *McLaren* v. *Thomson* (3) *Scadding* v. *Lorant* (4) was followed under these circumstances: "A company's articles enabled members to vote by proxy, but provided (art. 72) that 'The instrument appointing a proxy shall be deposited at the registered office of the company not less than two clear days before the day for holding the meeting at which the person named in such instrument proposes to vote': Held, that proxies lodged between the dates of an original meeting and the adjournment thereof were invalid, the adjourned meeting being in law merely a continuation of the original meeting." In the Court of Appeal, affirming that decision, Swinfen Eady L.J. said (5): "It is conceded that for the purpose of considering what business can be transacted at an adjourned meeting the adjourned meeting is to be considered as the original meeting"; and Warrington L.J. said (6): "It is perfectly plain that under these articles for a very large number of purposes a meeting which has been interrupted by an adjournment

(1) 3 H. L. C. 446.
(2) 3 H. L. C. 447.
(3) [1917] 2 Ch. 41.
(4) 3 H. L. C. 418.
(5) [1917] 2 Ch. 261, 264.
(6) [1917] 2 Ch. 266.

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or by more than one adjournment, is nevertheless to be treated as a single and continuous meeting—one meeting." I have been referred to a decision of Eve J. in *Catesby* v. *Burnett* (1), where the learned judge had to consider whether the election of certain directors was or was not valid. That depended entirely upon the wording of the articles of the particular company, and it does not in any way deal with the provisions of s. 69 of the Act or the decision in *Scadding* v. *Lorant*. (2) For these reasons, in my opinion, the confirmatory resolutions were validly passed at a general meeting of which notice was duly given, and which meeting was "held after an interval of not less than fourteen days, nor more than one month, from the date of the first meeting."

Solicitors for plaintiff: *Mayo, Elder & Co.*
Solicitors for defendants: *Birkbeck, Yeo & Co.*

P. J. B.

RUSSELL J.
1925
March 18, 19; *April* 3.

BEYFUS *v.* LODGE.

[1924. B. 4692.]

Vendor and Purchaser—Title—Leaseholds—Landlord's Notice to repair to Vendor—Liability of Purchaser to repair under the Conditions of Sale—Non-disclosure of Notice to Purchaser—Material Fact—Misleading Conditions—Specific Performance—Return of Deposit.

On July 31. 1924, the defendant purchased from the plaintiffs two leasehold houses and paid a deposit. Completion was fixed for August 21, 1924.

Under the lease the vendors were bound to do the inside and outside repairs. The conditions of sale provided that the purchaser should execute all necessary repairs. Requisitions on title were delivered, one of which asked whether any notices from landlords had been served on the property. The answer was that the vendors were not aware of any. The answer was made in good faith, but in fact the vendors had received landlord's notices on July 7, 1924, calling upon them, within three months of July 4, 1924, to make good the dilapidations found to have accrued on the premises "as per the schedule hereto annexed."

On discovering their mistake the vendors, on August 20, 1924, sent copies of the notices to the purchaser, who then declined to complete

(1) [1916] 2 Ch. 325. (2) 3 H. L. C. 418.

unless the vendors complied with the notices at their own expense. Condition 6 of the conditions of sale provided that the production of the last receipt for rent should be conclusive evidence that all the covenants had been complied with. Condition 8 provided that if any notices were outstanding they should be complied with at the expense of the purchaser. The plaintiffs brought an action for specific performance of the contract by the defendant. The defendant counter-claimed for the rescission of the contract and the return of his deposit:—

Held, that the notices contained material facts which it was the duty of the vendors to disclose, and that the non-disclosure deprived them of the right to the special relief of specific performance; that neither condition 6 nor condition 8 relieved the vendors from the obligation of disclosing the notices, because the former required the purchaser to assume to be true that which the vendors knew at the time of the sale to be untrue, and the latter only stated as a contingency that which the vendors knew to be a fact.

Held, also, that the purchaser having made out no case for the rescission of the contract it was good at law, and since the purchaser refused to complete according to its terms he was not entitled to the return of his deposit.

Carlish v. *Salt* [1906] 1 Ch. 335 distinguished.

SPECIFIC PERFORMANCE ACTION.

This was an action by the vendors for specific performance of a contract by the defendant to purchase from the vendors two leasehold shops and houses known as Nos. 102 and 104 Boundary Road, which formed respectively Lots 30 and 31, at an auction sale of numerous freehold and leasehold properties of the vendors held on July 31, 1924.

Each of the two lots was held by the vendors for an unexpired term of some twenty-six years, at a ground rent of 10*l.* per annum, under a lease which cast upon them the burden of inside and outside repairs: each was sublet to a tenant on a yearly tenancy, showing a profit rental as to Lot 30 of 53*l.* per annum and as to Lot 31 of 60*l.* per annum.

The properties offered for sale at the auction formed part of the estate of the late Solomon Beyfus, the vendors being his executors.

At the time when the particulars and conditions of sale were prepared no notice had been received from the head landlords of Lots 30 and 31 requiring any repairs to be executed on those premises.

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At the auction Lot 30 was purchased by the defendant for 275*l.*, and Lot 31 was purchased by him for 375*l.*, and he signed one contract comprising both lots, paying a deposit of 65*l.* and agreeing to complete the purchase according to the conditions of sale.

By condition 5 the leases were offered for inspection and the purchaser was deemed to have notice of the contents thereof.

By condition 6 it was provided that "the production of the last receipt for the rent due under the respective leases . . . . shall be conclusive evidence that all rents under the respective leases have been paid and that all covenants and conditions in the said leases respectively to which such receipts refer have been performed and observed and that all breaches thereof have been effectually waived or sanctioned up to the time of the completion of the purchase, whether it shall appear that the lessors or reversioners were cognizant of such breaches or not."

Condition 8 contained the following provision: "If any notices from landlords, sanitary or other authorities are outstanding or shall be received between the sale and completion of each purchase they shall be complied with at the expense of the purchaser."

By condition 13 the assignment to the purchaser was to contain a covenant by him to observe and perform the lessees' covenants contained in the respective leases and to keep indemnified the vendors from and against all claims and demands for or on account of breach of such covenants. The final condition provided for the forfeiture of the deposit upon failure by the purchaser to comply with the conditions Completion was fixed for August 21, 1924.

In due course requisitions on title were delivered, which included one asking whether any notices from landlords had been served on the property. The answer, dated August 18, was: "The vendors are not aware of any." This answer, though made in good faith, was untrue. The particular individual in the offices of Messrs. Beyfus & Beyfus who was attending to the matter and was responsible for the

answer was not aware of any; but in fact Mr. Philip Beyfus, a partner in the firm and one of the vendors, had on July 7, 1924, received a landlord's notice in respect of each of the two houses. He put them away, and the clerk who was attending to this conveyancing matter knew nothing about them.

Each notice called upon the lessees within three months of July 4, 1924, to reinstate and make good the whole of the dilapidations found to have accrued in or upon the premises "as per the schedule hereto annexed," the value of which was in the notices assessed in the case of No. 102 at 251*l.* and in the case of No. 104 at 187*l.* 15*s.*; making a total sum of 438*l.* 15*s.* These notices were, in fact, superseded by fresh notices in identical terms dated March 12, 1925, and expiring on June 11, 1925.

The mistake made in the answers to requisitions was soon discovered. The purchaser's solicitors were informed at once by letter of August 20, 1924, and the next day copies of the notices were sent to them. Nothing having been heard from the purchaser's solicitors, Messrs. Beyfus wrote to them on September 4, asking for the draft assignment. The purchaser's solicitors did not answer that request, but on September 16, they wrote the following letter: "With reference to your letter to us of the 21st ult. enclosing notices of dilapidations in respect of these premises. On behalf of our client, we object to the title on the ground of the non-disclosure of the landlord's notices at the time of the sale. Our client also declines to complete the purchase unless the vendor complies with these notices at his own expense previous to completion." That was answered by a letter of September 18, in the following terms: "We are in receipt of yours of the 16th instant and note you say that your client declines to complete the purchase unless the vendor complies with the notice at his own expense previous to completion. Our instructions are that if your client still takes up that position proceedings will be taken for specific performance."

On September 28, the writ was issued. The defendant denied the right of the plaintiffs to specific performance and

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also, by counterclaim, asked for rescission of the contract, repayment of the deposit, and payment of his costs of investigating title.

Courthope Wilson K.C. and *E. Knowles Corrie* for the plaintiffs. The landlord by serving the notices requiring the premises to be put in repair within three months has precluded himself from bringing an ejectment before the expiration of that period: *Doe* v. *Meux.* (1) Therefore when the purchaser refused to complete on September 16, 1924, the vendors were able to give a good title. The first notices having been superseded by notices in identical terms dated March 12, 1925, and expiring on July 11, 1925, no ejectment can be brought before the latter date. The vendors can show a good title apart from condition 6, and it is therefore immaterial whether the condition is misleading or not, and therefore the purchaser cannot decline specific performance: Williams on Vendor and Purchaser, 3rd ed., p. 185.

Non-disclosure on the sale of land of a fact material to the *title* of the property sold stands on a different footing from non-disclosure of a fact relating to its *quality*. The vendor is bound to state his title fairly, and the suppression of a fact material to the title may, according to the degree in which it affects the title, be a ground for rescinding the contract or for resisting its specific performance: Williams on Vendor and Purchaser, 3rd ed., p. 758. Even if the existence of the notices be a defect in the title the vendors can cure the defect by themselves doing the repairs (recovering the cost from the purchaser under conditions 8 and 13), and so prevent any right of re-entry arising: *Lockharts* v. *Bernard Rosen & Co.* (2)

Preston K.C. and *A. M. Begg* for the defendant. A condition that a purchaser shall assume or admit things which to the vendor's knowledge are untrue is a misleading condition, and if such a condition is used and not waived the purchaser will be entitled to resist specific performance: *In re Banister.* (3)

(1) (1825) 4 B. & C. 606. (2) [1922] 1 Ch. 433.
(3) (1879) 12 Ch. D. 131.

Condition 6 is misleading, because it required the purchaser to admit that all the covenants of the lease had been performed, and that was untrue to the vendors' knowledge. It was the duty of the vendors to disclose the landlord's notices to repair as the knowledge of their existence would have affected the price to be paid by the purchaser. The existence of the notices was a defect in the title, and the non-disclosure is a ground for the rescission of the contract and the return of the deposit: *Carlish* v. *Salt* (1); *Stevens* v. *Adamson* (2); *Penniall* v. *Harborne* (3); Fry on Specific Performance, 6th ed., § 705.

If a breach of covenant is committed and there is a possibility of forfeiture the title is not one the vendors can force on the purchaser, although the landlord has taken no steps to enforce his rights. Sect. 14 of the Conveyancing Act, 1881, does not make any breach of covenant which would result in a forfeiture not a breach, it merely provides that notice must be served before the forfeiture can be enforced: *Coatsworth* v. *Johnson*. (4)

Condition 8 does not relieve the vendors from the necessity of disclosing the notices, because it states as a contingency only that which they knew to be a fact. The condition protects the vendors only if it afterwards transpires that the property sold was subject to some right in favour of a third person of which they were ignorant at the time of the sale: *Heywood* v. *Mallalieu* (5); *Nottingham Patent Brick and Tile Co.* v. *Butler* (6); Dart's Vendors and Purchasers, 7th ed., vol. i., p. 172; Williams on Vendor and Purchaser, 3rd ed., p. 66. It would be most mischievous to allow a vendor to suppress facts known to him to affect the title, and yet compel the purchaser to accept it: *Edwards* v. *Wickwar*. (7)

The second notices served in March, 1925, were served after joinder of issue, and should be ignored. The right of the vendors to rescind when the action was set down cannot

(1) [1906] 1 Ch. 335.
(2) (1818) 2 Stark. 422.
(3) (1848) 11 Q. B. 368, 376-377.
(4) (1886) 55 L. J. (Q. B.) 220.
(5) (1883) 25 Ch. D. 357.
(6) (1886) 16 Q. B. D. 778.
(7) (1865) L. R. 1 Eq. 68.

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be affected by new notices which were only served on March 12, 1925.

Courthope Wilson K.C. in reply. In all the cases relied on by the defendant there was a defect in the title which could not be cured. *Edwards* v. *Wickwar* (1) was a case of an undisclosed underlease, and therefore the title was defective. The Court held that a defective title could not be forced on the purchaser. In *Nottingham Patent Brick and Tile Co.* v. *Butler* (2) there were restrictive covenants which were not disclosed and the purchaser had bought something different—namely, a property without such restrictions. In *Stevens* v. *Adamson* (3) the purchaser had been ejected and therefore the whole consideration had failed, and the vendor could not carry out his contract.

In *Penniall* v. *Harborne* (4) the lease had been forfeited and the landlord could either waive his right or insist on re-entry. In this case no action for ejectment would lie now. The purchaser says there was an obligation on the vendors to disclose the notices to repair. It is submitted that the vendors are only bound to disclose anything they cannot cure, and here the vendors can cure any defect by themselves doing the repairs.

In *Carlish* v. *Salt* (5) the party wall notice, and the subsequent award, deprived the purchaser of part of the subject matter of the contract until he had paid the adjoining owner a sum over and above the purchase price. This the purchaser under the terms of the contract was not bound to do, and therefore in claiming the return of his deposit, when the vendor did not vest in him the property agreed to be sold, he was not trying to break the legal contract between the parties. Here the contract is binding at law and the deposit paid under the legal contract cannot be recovered: *In re Scott and Alvarez's Contract* (6); Webster on Conditions of Sale, 3rd ed., p. 232.

Cur. adv. vult.

(1) L. R. 1 Eq. 68.
(2) 16 Q. B. D. 778.
(3) 2 Stark. 422.
(4) 11 Q. B. 368.
(5) [1906] 1 Ch. 335.
(6) [1895] 2 Ch. 603, 615.

April 3. RUSSELL J. [after stating the facts:] As a matter of construction I decide that the effect of conditions 8 and 13 was to throw upon the purchaser the burden of executing all necessary repairs, and that whether at the date of the sale any notice of dilapidations had or had not already been served. In other words, what was being offered for sale was the houses as they stood, subject to the obligations to repair contained in the leases. Both parties in fact acted on that footing. The purchaser made his bids after taking into account a sum of 100*l.* to 150*l.* to be spent by him on repairs; the reserves were fixed upon a similar basis, but the sum allowed for repairs was considerably larger. As regards the purchaser, however, it should be said that although he lives next door, at No. 100, he had no opportunity of inspecting the internal condition of the lots purchased by him, and so forming any reliable estimate of the amount which he might be forced to expend upon the property.

The next question to decide is whether in the circumstances which I have detailed I ought to grant to the vendors the peculiar relief of specific performance. Although acting in good faith, they withheld from the purchaser knowledge of the fact that notices had been served before the sale—notices which if disclosed would have revealed three things: firstly, the extent of the repairs which the covenantee required to be done; secondly, the amount required by the covenantee to be expended; and, thirdly, the time available within which the purchaser could provide the necessary money, do the work and avoid the risk of forfeiture. In my opinion, and the evidence bears this out, those were all matters material for the purchaser and all intending bidders to know to enable them to decide whether they should bid at all, and, if so, the amount to which they would be prepared to go.

This appears to me a matter directly affecting the value of the property which was within the vendors' knowledge, which the intending purchaser could not have ascertained, and which it was the vendors' duty to disclose. The value of the property can only be measured after taking into account the amount required to be expended on repairs: the purchaser

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is given no opportunity for forming an estimate; the vendor knows the exact amount, but fails to disclose a fact which would have revealed the amount. The vendor cannot, in my opinion, on this part of the case, derive any assistance from either condition 6 or condition 8. The former binds the purchaser to assume a state of affairs which the vendor at the time of the sale knew to be untrue without fairly bringing the fact to the attention of the purchaser; the latter states only as a contingency what the vendor knew to be an actual fact.

In my opinion it would be wrong in the present case to grant specific performance of the contract against the purchaser.

No authority appears to me exactly to cover this case, for neither in *Stevens* v. *Adamson* (1) nor in *Carlish* v. *Salt* (2) (to which I will refer later) did any question of specific performance arise for consideration. In each of those cases, however, it was held that a material fact had been concealed which the vendor was bound to disclose; in the first case, the fact of the service by a landlord of a notice to repair; in the second case the fact of the service of a party wall notice and the issue of an award under the London Building Act, 1894.

The granting of a decree for specific performance is a matter within the Court's discretion. The Court must consider whether it is just to adopt such a course: see per Lindley L.J. in *In re Scott and Alvarez's Contract.* (3)

In the present case the vendors having concealed a material fact which it was their duty to disclose, it would not, in my opinion, be just to grant a decree of specific performance, and I decline to do so.

As regards the claim to a return of the deposit the matter appears to me to stand upon a different footing. Upon the true construction of the contract the defendant contracted to buy these leaseholds subject to the burden of repairs and, by virtue of conditions 8 and 13, whether or not

(1) 2 Stark. 422. (2) [1906] 1 Ch. 335.
(3) [1895] 2 Ch. 603, 613.

any notice by the landlord had at the date of sale been in fact served. Although the vendors are unable to obtain specific performance against the purchaser, the vendors are not breaking the contract; the purchaser, in refusing to complete, is breaking the contract. Nevertheless, he claims his deposit back, which by the terms of the contract the vendors may forfeit. This position is clearly explained by Lindley L.J. in *In re Scott and Alvarez's Contract.* (1) In order to succeed on this claim the purchaser must, it appears to me, show a case for rescission of the contract. This in my opinion he has failed to do.

He relied upon various authorities in support of his claim; to these I will now refer. Some of them are to some extent relevant also upon the question of specific performance. *Heywood* v. *Mallalieu* (2) was a case where an easement constituted an incurable defect in the title; the vendor could not vest in the purchaser a good title to the subject of the sale, nor was there to be found in the contract any provision fairly calling the purchaser's attention to the imperfection in the title and binding him to accept the imperfect title. That seems to me a clear case both for refusing specific performance and for ordering the return of the deposit. The purchaser was entitled to rescind and get back his deposit, because the vendor could not carry out his contract.

Edwards v. *Wickwar* (3) was merely a case where the vendor was seeking to force upon the purchaser an imperfect title without having fairly called his attention to the imperfection and binding him to accept the imperfect title. No question arose at that stage as to return of the deposit.

Nottingham Patent Brick and Tile Co. v. *Butler* (4) was an action by purchasers to recover their deposit, the vendors counterclaiming for specific performance. In that case there existed a blot on the title, and the vendor was seeking to force the imperfect title on the purchaser by means of a general condition which in no way called attention to the

(1) [1895] 2 Ch. 603, 612.
(2) 25 Ch. D. 357.
(3) L. R. 1 Eq. 68.
(4) 16 Q. B. D. 778.

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blot. As regards the claim to a return of the deposit, the Court took the view that an active misrepresentation inducing the contract had been made, and that the purchaser was entitled to rescind the whole contract and recover the deposit. But for the misrepresentation the deposit would not have been recoverable.

Stevens v. *Adamson* (1) was a case at nisi prius; and from the details contained in the report it would appear (as was pointed out by Rigby L.J. in *In re Leyland & Taylor's Contract* (2)) that the purchaser (who apparently had been let into possession before completion) had actually been ejected by the landlord. In other words the lease which the vendor contracted to sell had been forfeited and had ceased to exist. Nothing is said as to the terms of the conditions of sale; but clearly the vendor was unable to vest in the purchaser any title to the subject of the sale. In these circumstances it is not surprising that the plaintiff became entitled to a verdict. The vendor could not carry out his contract; the purchaser was therefore entitled to rescind and recover the deposit. The case is no authority for the general proposition that failure by a vendor to disclose a landlord's dilapidation notice served before the date of the sale will entitle the purchaser, whatever the terms of the contract, to rescind the contract and recover the deposit.

Carlish v. *Salt* (3) was founded to a great extent on *Stevens* v. *Adamson*. (1) The contract there was an open contract. The effect of the party wall notice and the subsequent award (which had been concealed by the vendor) was to deprive the purchaser of part of the subject matter of the sale until payment by him to the adjoining owner of a sum of money over and above the amount of the purchase price. The vendor refused to make any compensation. In particular there was no term of the contract which covered the point in question; accordingly, in claiming the return of the deposit the purchaser was not himself seeking to break the legal contract between the parties: the vendor, in claiming to

(1) 2 Stark. 422. (2) [1900] 2 Ch. 625.
(3) [1906] 1 Ch. 335.

retain the deposit without having vested in the purchaser the property agreed to be sold, was breaking his bargain. That decision is distinguishable from the case before me, and is no authority for ordering the return of the deposit in the present case, where the legal contract between the parties provides in terms for the event of a dilapidations notice being current at the date of the sale.

So far as the claim for a return of the deposit is concerned the purchaser has made out no case justifying rescission of the contract. There was no misrepresentation, there was, it is true, omission to disclose a material fact, but such omission rendered no stated fact untrue. Nor can it be said that the vendor is unable to carry out his contract in accordance with the terms thereof, the contract being for the sale of leaseholds subject to the liability under covenants to repair, as to which the contract expressly states that there may be landlord's notices outstanding at the time of sale.

The result is that while the omission to disclose a material fact deprives the vendors of the special relief of specific performance, the contract stands at law, and since the purchaser refuses to complete according to its terms, he loses his deposit.

As to costs the strict order would be to dismiss the action and counterclaim, in each case with costs, and order a set off. In view of the fact that the evidence may fairly be said to be relevant to both claim and counterclaim, I think substantial justice will be done by dismissing both claim and counterclaim without costs; and this I do.

Solicitors: *Beyfus & Beyfus; Simon, Haynes, Barlas & Ireland.*

J. B. B. M.

ROMER J.

1925

Feb. 13, 25.

In re GRAY.

TODD *v.* TAYLOR.

[1924. G. 1226.]

Will—Charitable Gifts—Validity—Gift to Regiment for Promotion of Sport —Physical Efficiency—43 Eliz. c. 4.

By his will a testator gave a sum of 300*l.* to form the nucleus of a regimental fund for his regiment "for the promotion of sport (including in that term only shooting fishing cricket football and polo)." He also thereby gave directions as to the management of the fund. Later in the will he directed the payment of a further sum of 2000*l.*, in the events which happened, "to the aforesaid Sporting Fund" to be held upon the same terms as the former legacy:—

Held, that the gifts were gifts for the purpose of promoting the physical efficiency of the army, and were valid charitable gifts.

In re Good [1905] 2 Ch. 60 followed.

In re Mariette [1915] 2 Ch. 284 applied.

ADJOURNED SUMMONS.

The testator, the Hon. Lonsdale Richard Douglas Gray, by his will in which he described himself as "of the 6th Dragoon Guards (the Carabiniers)" gave "the sum of 300*l.* to form the nucleus of a regimental fund for the Carabiniers for the promotion of sport (including in that term only shooting fishing cricket football and polo) the said fund to be called 'the Gray Fund' and to be managed by a committee of two captains and three subalterns of the said regiment to be elected annually by the officers of the said regiment." He also directed as follows: "The said committee shall have full control of the said fund and the income thereof shall be divided annually as to one half amongst the officers of the said regiment and as to the other half amongst the men thereof in the promotion of such sport as aforesaid." He subsequently thereby directed that, in certain events which happened, there should be paid a further sum of 2000*l.* "to the aforesaid Sporting Fund in the Carabiniers to be held upon the same terms as the former legacy thereto."

The testator died on June 10, 1900. A regimental committee was duly constituted for the management of the fund, and

sums of money were duly paid to that committee by the trustees of the will.

In 1924 the trustees of the will, being under the impression that the Carabiniers had recently been disbanded and, in view of the fact that a portion of the total sum given by the testator to the fund remained unpaid, took out this summons for the determination of the question whether the trusts of the legacies were void or failed "owing to the disbandment of the said regiment or for any other reason." It was, however, as a result of inquiries, admitted at the hearing that the regiment had not ceased to exist, but still existed under another name.

B. J. Leverson for the plaintiffs.

H. J. H. Mackay for one of the residuary legatees. These legacies are not charitable legacies. They do not fall within the objects in the preamble to 43 Eliz. c. 4; nor do they fall within the four classes defined by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel.* (1) In *In re Nottage* (2) it was held that a gift for the purposes of sport was not a charitable gift. The gift here is merely a gift to enable the officers and men of the regiment to spend their time in a profitable and pleasant manner. The distinction between public purposes beneficial to the community and charitable purposes is fully discussed in *Attorney-General* v. *National Provincial and Union Bank of England.* (3) He also referred to *In re Macduff* (4); *Blair* v. *Duncan* (5); and *Houston* v. *Burns.* (6)

Dighton Pollock for another residuary legatee supported the above argument.

Farwell K.C. and *C. R. R. Romer* for the treasurer and secretary of the fund. It is not contended on behalf of the regiment that a gift for the promotion of sport in general terms is a charitable gift. The present gift, however, is a gift for the promotion of mental or bodily efficiency, and is

(1) [1891] A. C. 531, 583.
(2) [1895] 2 Ch. 649.
(3) [1924] A. C. 262, 264, 267.
(4) [1896] 2 Ch. 451, 466.
(5) [1902] A. C. 37, 48.
(6) [1918] A. C. 337, 343.

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therefore valid. Such a gift comes exactly within 43 Eliz. c. 4 as being a gift for the "setting out of soldiers," because funds of the country are applied in assisting officers and men to obtain benefits, for the purpose of recreation, such as the provision of football grounds. The case is very similar to *In re Good.* (1) In that case a gift which tended to promote the efficiency of the army was, on that ground, held to be a valid charitable bequest. *In re Mariette* (2) illustrates the proposition that the promotion of physical efficiency is as important as the promotion of mental efficiency.

Mackay in reply. In *In re Mariette* (2) the gift was a gift to a school which was already a charity—i.e., it was a gift to increase the efficient carrying on of the charity.

ROMER J. In this case I have to decide a question as to whether two legacies given by a testator are valid, or whether they have failed on the ground that they are given on trusts which are not charitable and which will last beyond the limits allowed by the rule against perpetuities. It is also asked by the summons whether the trusts, assuming them to be valid, have failed owing to the disbandment of the regiment mentioned in the testator's will. I think, however, that it is reasonably clear that the regiment has not ceased to exist, but still exists under another name. That particular point was, therefore, very properly abandoned at the Bar.

Now the testator who describes himself as "of the 6th Dragoon Guards (the Carabiniers)" gives the first of the two legacies in these words: "I give the sum of 300*l.* to form the nucleus of a regimental fund for the Carabiniers for the promotion of sport (including in that term only shooting fishing cricket football and polo) the said fund to be called 'The Gray Fund' and to be managed by a committee of two captains and three subalterns of the said regiment to be elected annually by the officers of the said regiment. The said committee shall have full control of the said fund and the income thereof shall be divided annually as to one half amongst the officers of the said regiment and as to the other

(1) [1905] 2 Ch. 60. (2) [1915] 2 Ch. 284.

half amongst the men thereof in the promotion of such sport as aforesaid." The second legacy is given in these words: "Whereas upon the death of my mother the said Baroness Gray I may under a certain settlement made by my said brother and my mother become entitled to property of which I am not already possessed and I may become entitled to further property under other wills. Now I direct that if and when the same or any part thereof shall fall into possession there shall be paid thereout the following legacies namely: 2000*l.* further to the aforesaid Sporting Fund in the Carabiniers to be held upon the same terms as the former legacy thereto."

It is contended on behalf of the persons entitled to the residue that those two legacies were given on trusts which are not charitable. It is said that the object of the testator was merely to encourage sport. If that were so the gifts would no doubt be given on trusts which were not charitable: see *In re Nottage* (1), where a gift for purposes of encouraging yacht racing was held not to be a charitable legacy. But in my opinion it was not the object of the testator in the present case to encourage or promote either sport in general or any sport in particular. I think it is reasonably clear that it was his intention to benefit the officers and men of the Carabiniers by giving them an opportunity of indulging in healthy sport. It is to be observed that the particular sports specified were all healthy outdoor sports, indulgence in which might reasonably be supposed to encourage physical efficiency. That I think was his object even though he refers to the fund as the "Sporting Fund." This case, therefore, does not, in my opinion, fall within *In re Nottage*. (1)

I realize the truth of what Eve J. said in *In re Mariette* (2) as to the natural inclination of the Court, if possible, to give effect to a gift of this sort and the danger of allowing that natural inclination to induce one to disregard established principles. But I am glad to find that there is an established principle enabling me to give effect to the gifts in the present case. This principle was established by Farwell J. in

(1) [1895] 2 Ch. 649. (2) [1915] 2 Ch. 284.

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In re Good (1) in 1905, a case that so far as I know has never been questioned in any way. In that case the testator gave his residuary personalty upon trust for the officers' mess of his regiment, to be invested and the income to be applied in maintaining a library for the officers' mess for ever, any surplus to be expended in the purchase of plate for the mess. According to the headnote of the report of that case it was held that the gift to maintain the library and to purchase plate for the officers' mess, being for a general public purpose tending to increase the efficiency of the army and aid taxation, was a good charitable bequest. It was also held that the gift might be supported as a "setting out of soldiers" within the meaning of those words in the statute of Elizabeth. But the judgment of Farwell J. was based primarily on the ground that the gift on trust for the maintenance of the library was a gift tending to increase the efficiency of the army, and he referred, only as a possible alternative ground, to the fact that the trust tended to aid taxation.

In the course of his judgment he said, referring to the argument for the Attorney-General: "Now Mr. Parker has put his argument on two grounds. First, he says that anything that improves the efficiency of the army is charitable within the meaning of the Act, because it is for a public purpose—a purpose in which the public are interested. Secondly, he says that it also comes within the last clause of the preamble of the statute of Elizabeth: 'The aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes,' because it will relieve the taxation of the public." Then he refers to the difficulties of applying the second part of that argument, because there was not at that time any provision made in the Army Regulations for payment by the Government in aid of the library of the mess, and then he says this: "I have come to the conclusion that this is a good charitable gift on the first ground—namely, that it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection

(1) [1905] 2 Ch. 60, 66, 67.

of the country." Later on he says: "I desire to avoid any misunderstanding. I am not of course suggesting for a moment that the officers are objects of charity. It is the public, not the officers, that are benefited by better means being put at the disposal of the officers to enable them to make themselves efficient servants of the King for the defence of their country." Then after referring to the decision of Kekewich J. in *In re Stephens* (1) and to the decision of Romer J. in *In re Lord Stratheden and Campbell* (2) he says: "I think it would be difficult to say that money given to be expended in terms in some specific way in order to increase the efficiency of a regiment in a particular mode is not a good charity. This gift, to my mind, does tend to increase the efficiency of the army by giving the officers greater opportunities of providing themselves with literature." Then, after dealing with the suggestion that the money might conceivably be applied in the purchase of books which were unlikely to increase the efficiency of the army, he says: "An officer is all the better equipped if he can speak several languages, and if he knows the history and geography of his own nation as well as many other nations, as well as being instructed in the military art. I should be sorry to have to hold that any gift which tends to educational equipment in that way is not a charitable gift."

It was suggested by Mr. Mackay that Farwell J. based his judgment on the ground that the gift fell within one of the classes specified by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (3)—i.e., that it came within the category of trusts for the advancement of education. It is quite clear, however, that Farwell J. was not proceeding on that ground, but that he decided the question on the ground that the gift tended to promote the efficiency of the army.

In the case before Farwell J. the efficiency was mental efficiency, and the only distinction between that case and the present case is that in the present case the efficiency is

(1) [1892] W. N. 140. (2) [1894] 3 Ch. 265.
(3) [1891] A. C. 531.

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physical as opposed to mental efficiency. But it is obviously for the benefit of the public that those entrusted with the defence of the realm should be not only mentally but also physically efficient, and I think I am justified in coming to the conclusion that there is no difference between mental and physical efficiency for the present purpose.

That view is, I think, supported by the observations of Eve J. in *In re Mariette.* (1) In that case the testator bequeathed "1000*l.* to the Governing Body of Aldenham School for the purpose of building Eton fives courts or squash racket courts, or for some similar purpose that shall be decided by a majority of the house masters at the time of my death"; and "100*l.* to the headmaster for the time being of Aldenham School, upon trust to use the interest to provide a prize for some event in the school athletic sports every year agreed upon by the committee of the athletic sports." In point of fact the school itself was admittedly a charity, but Eve J. did not decide the case on that ground. He pointed out that a gift to a charity may quite possibly be of such a character as not to be in itself a charitable gift, but he held that the gifts in the case before him were good because they promoted the efficiency of the bodies of the boys educated at the school. Referring to the importance of the development of the bodies as well as of the minds of the boys he said: "The object of this charity is the education, in the widest sense, of boys and young men between the ages of ten and nineteen. No one of sense could be found to suggest that between those ages any boy can be properly educated unless at least as much attention is given to the development of his body as is given to the development of his mind." One might equally well say that no person can be trained to be an efficient and useful soldier unless as much attention is given to the development of his body as to the development of his mind. Eve J. continues: "It is necessary, therefore, in any satisfactory system of education to provide for both mental and bodily occupation, mental occupation by means of the classics and those other less inviting studies

(1) [1915] 2 Ch. 284, 288.

to which a portion of the day is devoted, and bodily occupation by means of regular and organised games. To leave 200 boys at large and to their own devices during their leisure hours would be to court catastrophe; it would not be educating them, but would probably result in their quickly relapsing into something approaching barbarism." It appears to me that those remarks may also be applied to the education of soldiers.

For these reasons I hold that the legacies of 300*l.* and of 2000*l.* are good charitable gifts.

Solicitors: *Campbell, Hooper & Todd; Fladgate & Co.*

J. L. D.

OSBOURNE *v.* J. M. DENT AND SONS, LIMITED.

[1925. O. 130.]

Copyright—Infringement—Reproduction—Two or more Works reproduced in one Volume—"Work"—Royalties—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 3—*Interpretation Act*, 1889 (52 & 53 *Vict. c.* 63), *s.* 1.

The proviso to s. 3 of the Copyright Act, 1911, which deals with the reproduction of the published works of authors in which copyright subsists, does not prohibit the republication for sale of two or more such works in one volume.

MOTION (treated as trial of the action).

The plaintiff asked for an injunction to restrain the defendant company from infringing the copyright of the plaintiff in any of the works of Robert Louis Stevenson by reproducing or publishing any two or more of such works in single volume form, except on payment to him of a royalty at the rate of 10 per cent. of the published price of the volume in the case of each of the works contained therein.

The following statement of facts is substantially taken from the judgment:—

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The plaintiff in this action is the owner of the copyright in the works of Robert Louis Stevenson, who died on December 3, 1894. By virtue of s. 3 and s. 24, sub-s. 1, of the Copyright Act, 1911, the plaintiff's copyright in such of the works as were published in the author's lifetime will subsist for fifty years from December 3, 1894. In the case of works first published after the author's death the copyright will under s. 17 of the Act subsist for fifty years from the date of publication. There is, however, a proviso to s. 3 of the Act which is in these terms: "Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act thirty years, from the death of the author of a published work, copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of 10 per cent. on the price at which he publishes the work; and, for the purposes of this proviso, the Board of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties." In the case of a work first published after the author's death, it is enacted by s. 17 that the proviso shall apply as if the author had died at the date of the publication.

The term of thirty years from the death of Robert Louis Stevenson having now elapsed, the defendants, a well-known firm of publishers, are desirous of taking advantage of the above proviso, and of publishing certain of his works that were published in his lifetime, or were published after his death more than thirty years ago. With this end in view they wrote to the plaintiff on November 22, 1924, a letter

in these terms: "We propose to publish the undermentioned works by the late R. L. Stevenson, and hereby give notice to you, as owner of the copyright, of our intention in accordance with s. 3 of the Copyright Act, 1911, and s. 2 of the Copyright Royalty System (General) Regulations, 1912: (1.) Treasure Island and Kidnapped; (2.) Travels: An Inland Voyage, Travels with a Donkey, The Silverado Squatters; (3.) Essays: Familiar Studies of Men and Books, Virginibus Puerisque; (4.) Short Stories" [the names of several short stories were set out]; "(5.) The Master of Ballantrae and Black Arrow; (6.) Poems; Six Volumes in all. These works will be reproduced by printing and published at two shillings in our Everyman's Library. Copies will be delivered to purchasers after, and not before, January 1, 1925. With regard to the payment of royalties we shall be glad to hear from you whether you wish us to adopt the system of labels outlined in para. 4 of the Copyright Royalty System (General) Regulations, 1912, or whether you prefer us to remit our cheque at stated times to be arranged between us." In answer to this letter the plaintiff on November 24, 1924, wrote a letter which, so far as material, is as follows: "In answer to your kind letter of November 22nd, I can make no objection to your publishing separately any of the works of Robert Louis Stevenson in which the copyright has partly lapsed under the terms of the Copyright Act of 1911. . . . . I regret to say I must absolutely refuse to give my permission for you to include more than one work of Mr. Stevenson's in each of your proposed volumes. If you will kindly glance at clause 3 of the Copyright Act of 1911, you will notice that it is very specific in its reference to 'the work.' The inference is indubitable that two or more 'works' cannot be printed in a single volume."

The defendants disputed the construction which the plaintiff sought to place upon s. 3 of the Act and the present action was commenced for the purpose of determining the question whether the inclusion in one volume of two or more of the "works" of Robert Louis Stevenson would constitute an infringement of the plaintiff's copyright.

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Luxmoore K.C. and the *Hon. S. O. Henn Collins* for the plaintiff. The plaintiff is entitled to an injunction restraining the publication of more than one of the author's works in a single volume. This was never contemplated when the section was framed. The word "work" in the proviso means "each separate work" or "each separate story." The defendants cannot use the right given to them under s. 3 unless they comply with the provisions of that section. By reg. 2 (*d*) of the Rules and Orders made under the Act they are obliged to give notice of the "price or prices at which they intend to publish the work." The defendants, by publishing several works in a single volume, cannot indicate the published price of each work published in that volume. In order to comply with the section they must produce each work in a separate volume. They might, perhaps, produce in one volume, without objection, a collection of short stories originally produced in one volume.

Maugham K.C. and *Macgillivray* for the defendants. Sect. 1 of the Interpretation Act, 1889, provides that in that Act and in every Act passed after the year 1850, unless the contrary intention appears, words in the singular shall include the plural. The only question in this case is whether there is in s. 3 of the Copyright Act, 1911, any contrary intention which prevents the defendants from doing that which they are directed to do by the Interpretation Act. The effect of the proviso to s. 3 is to give a general statutory right to republish works in any form in which the publishers may think right to publish them. That is a general right granted to the public to republish, after the expiration of the period, the works of an author without qualification. With regard to the word "work" the singular must include the plural unless the proviso to s. 3 is to be rendered nugatory. Not only can the proviso be read properly by treating the plural as included in the singular, but that is the most sensible way of reading it. There is no difficulty in republishing all the poems of an author in one volume, if the publisher would pay 10 per cent. on the price at which he publishes that volume. As the defendants do not propose to include in the volumes the

works of other authors, they have the benefit of the general statutory licence and are entitled to do that which they propose to do.

Luxmoore K.C. in reply.

Cur. adv. vult.

March 26. ROMER J. [after stating the facts and saying that the action had been brought for the purpose of determining the question whether it was permissible for the defendants to include in one volume two or more of the works of Robert Louis Stevenson, continued :] The Act does not in terms prohibit it. The plaintiff, however, contends that it does so by implication. Whether it does so or not is the question that I have to determine.

Now it is a condition precedent to obtaining the protection given by the proviso to s. 3 of the Act that the person reproducing the work shall prove that he has given the prescribed notice of his intention to reproduce the work and has paid in the prescribed manner to the owner of the copyright royalties in respect of all copies of the work sold by him calculated at the rate of 10 per cent. on the price at which he publishes the work. By reg. 2 of the Rules and Orders made under the Act it is provided that the prescribed notice shall contain amongst other particulars "(*d*) the price or prices at which it is intended to publish the work." It is contended by the plaintiff that if the defendants include in one volume two or more works it will be impossible for them to ascertain the price at which any one of these works is published. They cannot, therefore, it is said, comply with the precedent conditions to which I have referred, and the publication of the volume will be an infringement of the plaintiff's copyright. But if it were possible to ascertain accurately how much of the price charged for the entire volume was charged in respect of each work comprised in it, the conditions would be fulfilled. In certain cases this might be done, I should have thought, without any great difficulty. Supposing, for instance, that the defendants were proposing to publish two works separately at 1*s.* each, but, for the

ROMER J. convenience of those who might prefer it, were proposing to
1925 publish at the same time the two works in one volume at
OSBOURNE 2*s*. In such a case it might be said without inaccuracy that
v. each work was being published at the price of 1*s*. But,
J. M. DENT & SONS, LD. however this might be, the defendants cannot in the present case state the price at which they intend to publish any particular work of Stevenson's. They intend, for instance, to publish "Treasure Island" and "Kidnapped" in one volume at 2*s*. It is impossible to ascertain accurately the price at which they are publishing either of these stories. The defendants might get out of the difficulty by stating that they intend publishing each story at 2*s*., or they might have to submit to be treated as though they were intending to publish each story at 2*s*. In cases where a person chooses to blend with his own work matter in which the copyright belongs to another, he cannot complain if the owner of the copyright treats the whole of the profits derived from the blended works as attributable to the pirated matter alone. In the same way if a person, who wishes to publish two copyright works in one volume, can only do so upon declaring the price at which he is publishing each work, it may well be that he would have to be treated as intending to publish each work at the price charged for the complete volume. It is upon this view of the matter that the plaintiff in the present case asks, in the alternative, for an injunction to restrain the defendants from publishing any two or more of Stevenson's works except upon payment to the plaintiff of a royalty at the rate of 10 per cent. of the published price of the volume in respect of each of the "works" contained therein. But such terms would render it impossible for the defendants to publish the volumes that they desire. "Familiar Studies of Men and Books," for instance, were published together in volume form in the year 1882. They comprise, however, nine separate and independent studies, each of which had been published earlier and separately in the "Cornhill," "New Quarterly" and "Macmillan's" magazines. Each study was, therefore, a separate work in respect of which the plaintiff has a separate copyright: see as to this *Johnson* v.

Newnes. (1) "Virginibus Puerisque," published in volume form in the year 1881, similarly consists of fourteen separate and independent works published separately between the years 1876 and 1879 in various magazines. According to the construction of the Act for which the plaintiff is contending, it would follow that, if the defendants desire to take advantage of the proviso to s. 3 by publishing "Familiar Studies of Men and Books" and "Virginibus Puerisque," they must either publish twenty-three separate volumes and pay a royalty upon each, or, if they include them both in one volume, must pay a royalty amounting to 230 per cent. of the published price. It may well be that even in the case of Stevenson's novels, the plaintiff's construction would prevent any republication of them under the proviso. "Treasure Island," for instance, was brought out serially in twenty-one instalments in a periodical called "Young Folks" between October, 1881, and December, 1882. It was not published in volume form until 1883. Having regard to the definition of the word "book" in s. 2 of the Copyright Act (5 & 6 Vict. c. 45), Stevenson acquired copyright in each instalment from the date of its publication in "Young Folks." Whether each instalment is a "work" within the meaning of the proviso to s. 3 of the present Act it is not easy to say. The Act contains no definition of a "work." Sect. 15, sub-s. 2, however, refers to a "work published in a series of numbers or parts," and it would look as though, for the purposes of the Act, a novel, though published in parts, is, when completed, to be regarded as a "work." But in the case of essays, short stories, or poems, separately published, each would seem to be a work, and to remain a work even after published in volume form with others. The volume itself cannot very well be a work. It is in truth a collection of works. If the plaintiff's contention be accepted, the practical result will therefore be that, so far as such works are concerned, the proviso to s. 3 might just as well have been omitted from the Act.

It appears to me, however, that the proviso is capable of a construction that avoids such a result, and, if so, it is my

(1) [1894] 3 Ch. 663.

ROMER J. duty to adopt that construction in preference to that advanced by the plaintiff. By virtue of s. 1 of the Interpretation Act, 1889, the word "work" in the singular, where used in the proviso, includes the word "works" in the plural, no intention to the contrary appearing in the proviso. So read, there can be no difficulty in the defendants stating the price or prices at which they intend publishing such of Stevenson's works as they desire to publish. They propose, for instance, to publish the works included under the titles "Familiar Studies of Men and Books" and "Virginibus Puerisque" at the price of 2*s*. It was said by Mr. Luxmoore that if the word "work" is to be read as including "works," so the word "price" is to be read as including the word "prices." This is so, no doubt. But it does not seem to me that it helps him. I am not bound to introduce the word "respectively" into the proviso, so as to make it read "the price or prices at which he publishes the works respectively." The defendants propose to publish several works of Stevenson and they have to state the price or prices at which they propose to publish them. This they have done. "Treasure Island" and "Kidnapped" are to be published together at 2*s*., and so on, through the list of works mentioned in the defendants' letter of November 22, 1924.

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For these reasons it seems to me impossible to say that the proviso by implication prevents the publication of two or more works in one volume. The motion must be refused.

Solicitors: *Field, Roscoe & Co.; Burch & Co., for Docker, Hosgood & Co., Birmingham.*

J. L. D.

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Feb. 9;
April 3.

In re BATHE.

BATHE *v.* PUBLIC TRUSTEE.

[1924. B. 998.]

Will—Codicils—Construction—Absolute Gift—Condition subsequent—Restraint of Marriage with particular Persons—Validity.

By his will a testator made certain bequests of personalty and a devise of a freehold house in favour of his son, the plaintiff, on his attaining twenty-five, and bequeathed the residue of his estate to the Public Trustee upon trust in certain events for the testator's brother absolutely. By a first codicil made on the same day as the will the testator directed that if his son should marry a certain lady therein named he should forfeit all benefits given by the will which should then devolve, according to the trusts of the residue, as if his son had died immediately after the testator's death without attaining twenty-one and without leaving issue. By a second codicil the testator extended the condition to marriage with a second lady therein named. The testator died in 1918, and in 1921 the plaintiff, having attained twenty-one, married his present wife, who was not one of the ladies mentioned in the codicils. In February, 1924, he attained twenty-five, and became entitled on possession to the real and personal property bequeathed. Both the ladies mentioned in the codicils were living, and one had married, and her husband was still alive. Neither of the ladies was fully and accurately described in the codicils, as in both cases the testator had omitted the second Christian name, and in one he had given the lady the surname of her stepfather. But the plaintiff in his affidavit had identified the individuals intended. On a summons by the plaintiff, asking whether the provisions in the codicils for forfeiture were valid, or void for uncertainty or otherwise:—

Held, that the condition was not void for uncertainty, nor illegal, inasmuch as it was only in partial restraint of marriage with particular persons.

Jenner v. *Turner* (1880) 16 Ch. D. 188 applied.

Held, further, that the condition was also not impossible of fulfilment so long as the plaintiff and either of the two ladies survived; and therefore the applicant took what was bequeathed to him subject to defeasance on breach of the condition at any time.

ADJOURNED SUMMONS.

By his will dated February 12, 1917, the testator, Henry Hearsey Bathe, of "Adjai," Southampton, surgeon, appointed the Public Trustee to be the sole executor and trustee thereof, and after bequeathing a pecuniary legacy and an annuity gave to his trustee all his household furniture, china, glass,

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linen, pictures, prints, books, plate, and plated articles and other his household effects, and personal ornaments, silver, and silver plate, upon trust to permit his wife, the defendant Ada Louise Bathe, to have the use and enjoyment of the whole until his son, the plaintiff Denys Bathe, should attain the age of twenty-five years, and upon the happening of such event he gave the whole to his said son absolutely; but in the event of his son predeceasing his (the testator's) wife, he directed that his wife should have the use and enjoyment of the before mentioned articles and things so long as she should live and remain unmarried, and upon her decease or second marriage he gave the same to his brother Anthony John Bathe absolutely, but subject to this proviso that if his said son should leave issue surviving then he directed that his trustee should divide the articles and things between such issue in such a manner as should appear to him in his absolute discretion to be just and fair, and so that the shares should be as nearly equal as possible. The testator then gave and devised his freehold dwelling-house with the garden and appurtenances, known as "Adjai," No. 28 Westwood Road, Southampton, to his said son Denys absolutely upon his attaining twenty-five, and until his son should attain that age his trustee should permit the testator's wife to have the use and enjoyment of his house and premises without paying any rent, or being responsible for any repairs. The testator then bequeathed all the residue of his estate to his trustee upon trust for sale, conversion, and investment and to pay the income thereof to his wife during her widowhood (provided his son should so long live) in manner therein mentioned, but if his son should die during the widowhood of the testator's wife without leaving lawful issue, then he directed his trustee to pay the said income to his wife and his brother Anthony John Bathe in equal proportions, but if his son should leave lawful issue then the income should be paid as to one moiety to the testator's wife, and as to the other to the lawful issue of his son; and upon the decease or second marriage of his wife the testator gave his residuary estate to his son Denys Bathe absolutely, with a proviso that should his son not

attain twenty-one, or predecease the testator's wife without leaving lawful issue, then on the decease or second marriage of his wife he gave his residuary estate to his brother Anthony John Bathe absolutely. The testator made a codicil on the same day, February 12, 1917, whereby he declared that if his son Denys should marry a certain lady named D —— B—— he should forfeit all benefits given to him by the will, and such benefits, not being residuary or a share of residue, should fall into his residuary estate, or being residuary or a share of residue should devolve in such manner as the same would have done under the trusts of the will and every codicil thereto, had his son Denys died immediately after the testator's death without attaining twenty-one, and without leaving any issue. By a second codicil dated June 4, 1918, the testator made a similar declaration of forfeiture in the event of his son Denys marrying a certain lady named E—— F——. The testator died on July 21, 1918, and the will and codicils were duly proved by the Public Trustee. Denys Bathe attained twenty-one on February 11, 1920, and on March 30, 1921, married Winifred May Lee (not being either of the ladies mentioned in the codicils). There were at present no issue of that marriage. On February 11, 1924, Denys Bathe attained twenty-five, and became entitled in possession to the real and personal property given to him by the will. There was evidence that the lady mentioned in the first codicil was not accurately described, her second Christian name being omitted; and the lady in the second codicil was also inaccurately described, in that her second Christian name was omitted and her stepfather's name was given instead of her father's. The son, in his affidavit, stated that he was never engaged to or contemplated marriage with either of these ladies, and his acquaintance with either was very slight. The lady referred to in the second codicil had now married, and her husband was living.

On December 20, 1921, Ada Louise Bathe and the plaintiff as surety mortgaged their life and reversionary interests in the testator's residuary estate and a life policy to the Eagle Star and British Dominions Insurance Company, Ld., to

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secure 2000*l.* borrowed from the said company by his mother. On August 24, 1923, and on December 2, 1923, the plaintiff executed a mortgage and a further charge on his interests under the will in favour of W. E. Lansdell to secure 800*l.* and interest. On February 21, 1924, the plaintiff, claiming to be beneficially entitled under the will of his father, issued a summons to have it determined (inter alia): (1.) Whether, on the true construction of the will, the plaintiff on attaining twenty-five was entitled to an absolute vested interest in possession to (*a*) the testator's furniture, ornaments, etc., bequeathed by the will and (*b*) the freehold house "Adjai," and whether the said interest was liable to be divested in any and what events. (2.) Whether the provisions contained in the codicils for forfeiture of all benefits in the event of the plaintiff marrying as therein mentioned were valid and still effective, or were void for repugnancy, uncertainty or otherwise, or ceased to operate on the plaintiff's marriage.

Gover K.C. and *Greenland* for the plaintiff. On question 1. The gift of the furniture and other effects to Denys on attaining twenty-five is absolute and also the gift of the freehold house. The substitutionary gift in a certain event does not cut down the original gift. The prima facie rule in *O'Mahoney* v. *Burdett* (1) as to the construction of an absolute gift with executory devise over is easily displaced by a context showing a contrary intention. That is the case here, and the words are reasonably free from ambiguity. *In re Roberts* (2) is an instance of where *O'Mahoney* v. *Burdett* (1) was distinguished: Jarman on Wills, 6th ed., pp. 2168, 2169. Denys is therefore under the terms of the will absolutely entitled.

Stafford Crossman for the Public Trustee.

Lyttelton Chubb for Mrs. Bathe.

Havers for those entitled to residue. As to the residue the son does not take absolutely on attaining twenty-five. If the testator had meant it he could have said so, as he did in the case of the other bequests and the devise: *Comiskey* v. *Bowring-Hanbury*. (3)

(1) (1874) L. R. 7 H. L. 388. (2) [1916] 2 Ch. 42.
(3) [1905] A. C. 84.

EVE J. held that on the true construction of the will Denys was indefeasibly entitled to the furniture, etc., and to the freehold house "Adjai."

On the second question as to the effect of the two codicils.

Gover K.C. The restraint of marriage condition is void for uncertainty. Neither of the two ladies can be strictly identified, as the names are not fully stated, and one is misdescribed. The general principles on which conditions subsequent, such as this, are construed are stated in *In re Sandbrook.* (1) But no question of public policy arises here. A further point is that the restrictive condition would, it is submitted, only apply to a first marriage, and it is now impossible of fulfilment, as the plaintiff is married: *Hutcheson* v. *Hammond.* (2) There is no case precisely in point, but similar points were discussed in *Lowe* v. *Manners* (3); *Kiersey* v. *Flahavan* (4); *Davis* v. *Angel* (5); and *Randal* v. *Payne.* (6)

J. Tanner for the Eagle Star and British Dominions Insurance Company adopted the same argument.

F. D. Morton for the other encumbrancer took the same view.

Stafford Crossman for the Public Trustee. There is evidence sufficient to show that the persons mentioned in the two codicils were known to Denys. Although not fully or accurately described they are sufficiently identified. The condition also was not necessarily incapable of being performed at a later date. It is therefore a condition subsequent, not uncertain, or impossible of fulfilment, and valid. Conditions in partial restraint of marriage are valid. In *Jenner* v. *Turner* (7) a condition in restraint of marriage with a domestic servant was held to be legal and enforced.

Havers for the residue. This condition is valid, as the persons intended by the testator are sufficiently indicated.

(1) [1912] 2 Ch. 471.
(2) (1790) 3 Bro. C. C. 128.
(3) (1822) 5 B. & Al. 917.
(4) [1905] 1 I. R. 45.
(5) (1862) 4 D. F. & J. 524.
(6) (1779) 1 Bro. C. C. 55.
(7) 16 Ch. D. 188.

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It is also a condition which, although the probability of its coming into operation is somewhat remote, is nevertheless capable of fulfilment in the event of the plaintiff's wife dying, and either of the two ladies mentioned in the second codicil surviving. *Randal* v. *Payne* (1) is an authority in favour of the validity of such a condition, and for this purpose there is no difference between a condition precedent and a condition subsequent.

Gover K.C. in reply referred to Jarman on Wills, 6th ed., p. 1534, and *Crommelin* v. *Crommelin.* (2)

Cur. adv. vult.

April 3. EVE J. [after stating the terms of the will and codicils and the material facts continued:] Both the ladies mentioned in the codicils are living, and one of them is married and her husband is still alive. In these circumstances the question is whether the condition is valid and effective, or void for uncertainty or for any other reason. It cannot, I think, be held to be void for uncertainty. It is true that the testator has not described either lady accurately. In both cases he has omitted the second Christian name, and in one he has given the lady the surname of her step-father and not that of her father, but the plaintiff's own affidavit removes any real doubt as to the identity of the individuals intended. This being so the question remains whether there is any other ground for declaring the condition inoperative. Although it is a condition in defeasance of an estate already vested and is in restraint of marriage, the restraint is only partial, and, on the authorities, it is impossible to hold that a testator may not make it a condition that the object of his bounty shall not marry a particular person, or persons identified by name, or as belonging to any specified class: *Jenner* v. *Turner.* (3) I cannot therefore say that the condition—harsh and fanciful as it may appear—is illegal. Nor again is it impossible of fulfilment. It is true that the probability of its coming into operation is remote,

(1) 1 Bro. C. C. 55. (2) (1796) 3 Ves. 227.
(3) 16 Ch. D. 188.

but so long as the plaintiff and either of the two ladies survive, the fulfilment of the condition is possible. I have looked again at all the cases cited during the argument, and at several others, but I cannot find anything which would warrant me in holding that this condition can be disregarded. The applicant will therefore take what is bequeathed and devised to him by the will subject to defeasance on breach of the condition at any time.

Solicitors: *Walter, Burgis & Co.*; *Oldman, Cornwall & Wood Roberts, for Swayne, Havers & Harfield, Southampton*; *Bolton & Hickman*; *Capron & Co.*

G. M.

BRITISH OXYGEN COMPANY, LIMITED *v.* LIQUID AIR, LIMITED.

[1925. B. 585.]

Copyright—Letter written by Manufacturers to Trade Customer offering Goods at low Price on certain Conditions—"Original literary work"—"Criticism"—"Fair dealing"—Infringement—Copyright Act, 1911 (1 & 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1 (*i*).

A letter written by manufacturers to a trade customer, offering their goods at a low price if the customer agrees to take such goods exclusively from them, is an "original literary work" within the meaning of s. 1, sub-s. 1, of the Copyright Act, 1911, and the writers are entitled to copyright therein. Such a letter is not contrary to public policy as being in restraint of trade.

The publication of the letter by rival manufacturers, together with a covering letter of criticism, is not "fair dealing" within the meaning of s. 2, sub-s. 1 (i), of the Act.

THIS was a motion by the plaintiffs to restrain the defendants from publishing, printing, circulating, exhibiting or parting with a letter dated December 17, 1924, and addressed by an agent of the plaintiffs to Tanks & Drums, Ld., in which letter was set out the terms upon which the plaintiffs were willing to supply oxygen to Tanks & Drums, Ld., and from authorizing to be published, printed, circulated or exhibited such letter

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or the effect thereof, or copies or photographic reproductions, or extracts therefrom, and from informing any person or persons of the contents of such letter. The letter of December 17 fell into the possession of the defendants, who caused twelve photographic reproductions of it to be made, and sent one, together with a letter criticising it, to a firm of stockbrokers. The facts are fully set out in the judgment. The motion was treated as the trial of the action.

Upjohn K.C., *Manning K.C.* and *Leeke* for the plaintiffs. The publication of the letter was a breach of copyright. That a letter of this nature is the subject of statutory protection is established by *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1) The publication was also a breach of confidence. This point is dealt with by Kekewich J. in *Philip* v. *Pennell.* (2) Here it is the confidence arising out of relationship of intending purchasers and sellers. Lord Eldon also deals with this point in *Gee* v. *Pritchard.* (3) Then the defendants contend that the plaintiffs' letter is unlawful and in restraint of trade. That contention is disposed of by Lord Halsbury in the *Mogul* case. (1) The letter was a perfectly legitimate letter to write, and the defendants were entirely unjustified in acting as they have done. The object of multiplying it was not to advance their own business, but to injure the plaintiffs' business. And the criticism of the plaintiffs' conduct in the covering letter sent out by the defendants was not fair dealing within the meaning of s. 2, sub-s. 1 (i), of the Copyright Act, 1911.

A letter is an "original literary work," and therefore entitled to copyright, and the fact that the letter is of no literary value is quite immaterial. The writer of an ordinary private letter does not publish it by sending it to his correspondent, but it would be different if he wrote the letter to a newspaper: see Copinger's Law of Copyright, 5th ed., p. 43. Romilly M.R. in *Howard* v. *Gunn* (4) says that a person has a property in letters written by him, and that this right cannot

(1) (1889) 23 Q. B. D. 598; [1892] A. C. 25.
(2) [1907] 2 Ch. 577, 586–7.
(3) (1818) 2 Swans. 402.
(4) (1863) 32 Beav. 462, 465.

be violated by the person who receives them. Peterson J. in *University of London Press, Ld.* v. *University Tutorial Press, Ld.* (1) deals very fully with what is meant by "literary work," and with the provisions of the Act of 1911. Sect. 1, sub-s. 2, gives a definition of "copyright," and s. 2, sub-s. 1, defines what is a breach of copyright. There is copyright in the letter written by the plaintiffs, and the facts of the case do not excuse the defendants in using it as they have done.

Sir Henry Slesser K.C., *Macgillivray* and *A. Jaffé* for the defendants. The Act of 1911 altered the law. It contains quite a new definition of copyright. There is no mention of "literary work" in the Act of 1842. Plumer V.-C. in *Lord Perceval* v. *Phipps* (2) draws a clear distinction between a literary and a commercial work.

If criticism is to be confined to literary criticism, then the subject of the criticism must be susceptible to literary criticism. If the letter is a literary work under s. 1, sub-s. 2, then the defendants' criticism is literary criticism.

The defendants were entitled to show that they were being fought, not on the merits of their oxygen, but by price cutting. That is the defendants' justification for publishing the letter: Plumer V.-C. in *Lord Perceval* v. *Phipps.* (3) A person is entitled to publish a letter if he can show that its publication is necessary for the protection of his character: *Labouchere* v. *Hess.* (4) The defendants were menaced at every turn in their business by the plaintiffs, and they were entitled to show the methods that were being adopted by the plaintiffs. Lord Parker deals with this point in *Attorney-General of the Commonwealth of Australia* v. *Adelaide Steamship Co.* (5) The Court has a discretion in this class of case. An attempt must not be made to get trade in utter disregard of the methods used: *Slingsby* v. *Bradford Patent Truck and Trolley Co.* (6) The publication of the letter protects the defendants, because it shows why they are losing contracts. This right to protect property and character has always existed.

(1) [1916] 2 Ch. 601, 608.
(2) (1813) 2 V. & B. 19, 28.
(3) 2 V. & B. 29.
(4) (1897) 77 L. T. 559.
(5) [1913] A. C. 781, 793.
(6) [1905] W. N. 122.

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In order to get protection for a literary work under the Act of 1911 a certain minimum of labour, judgment and skill must be shown. The mere stringing together of a few sentences is not sufficient to constitute a literary work. In *Macmillan & Co.* v. *Cooper* (1) the question was whether the work done by the author of a certain work was sufficient to entitle him to the product of his labour. In that case there was no originality. There must be substance in the document for it to be a literary work. As a literary work this letter has no value whatever. The plaintiff is not entitled to protection in respect of something which is worthless. If copyright did exist, the defendants were fully justified in making use of this work under the exceptions contained in the Act of 1911. Those exceptions are inserted for the very purpose of meeting cases of this kind, and they are designed to prevent a person from using a technical infringement of copyright in order to attain an ulterior object.

Cur. adv. vult.

April 6. ROMER J. The plaintiffs are manufacturers and sellers of oxygen gas. The defendant company are manufacturers and sellers of plant capable of making oxygen gas. In these circumstances there is, not unnaturally, great commercial rivalry between the two companies. The plaintiffs' object is to induce people who require oxygen to purchase it ready made from the plaintiffs. The defendants' object is to induce such people to purchase the necessary plant from the defendants, and to manufacture the gas for themselves.

In the month of December, 1924, the defendants had approached various consumers of oxygen in Bradford and the surrounding district with a view to inducing them to purchase from the defendants plant for the manufacture of the gas. Amongst these consumers was a firm of Tanks & Drums, Ld., who had been, and were at this time, valuable customers of the plaintiffs, and had been in the habit of purchasing from the plaintiffs oxygen in considerable quantities. With a view of inducing Tanks & Drums, Ld., to resist the blandishments

(1) (1923) L. R. 51 Ind. App. 109; 40 Times L. R. 186.

of the defendants, and to continue to purchase their oxygen ready made from the plaintiffs, instead of manufacturing it themselves, the plaintiffs approached Tanks & Drums, Ld., and offered to make substantial concessions as regards the price at which they were prepared to sell them oxygen. After some negotiations however the plaintiffs appear to have arrived at the conclusion that Tanks & Drums, Ld., were taking an unreasonable advantage of the situation, and, while prepared to take oxygen from the plaintiffs for just so long as they thought convenient on the most favourable terms that they could obtain, intended, as soon as they could obtain favourable terms from the defendants, to set up, or join with others in setting up, plant for the manufacture of the gas.

In these circumstances the plaintiffs caused to be written to Tanks & Drums, Ld., a letter dated December 17, 1924. That letter is in these terms: "Referring to our request that you should see our Mr. Devereux to-morrow and your remark on the 'phone to-day that there was no necessity for Mr. Devereux to come through, and to your further remark that you were not prepared to come to any definite arrangement with us, but only prepared to go on buying, without any obligation, for such time as suits your own convenience. We beg to call your attention to the fact that [as] it appears to be impossible to reach any reasonable arrangement with your firm, and one or two firms associated with you in Bradford, on similar terms to those we have effected with other consumers of oxygen elsewhere, it appears to us useless to waste further time in discussion particularly in view of the undersigned's many calls upon you. I have referred this matter to our managing director, and I am instructed to write you to the following effect: Whilst we shall regret to lose your business, we are not prepared to make any further concessions in price, consequently, I am to confirm the offer which I have made verbally—namely, to supply the full requirements of your firm in oxygen for a period of two years at" a certain price "per thousand cubic feet, delivered on our Leeds Works. This price to come into force on January 1 next, and to be on the

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clear understanding that, during the period of the contract, you will not take an interest in the erection of any oxygen plant in Bradford. This offer is open for your acceptance by that date, as we have the interests of other and less exacting clients in your trade to consider, and as we have no intention of permitting our service to be employed as a mere convenience pending the erection of an oxygen plant in Bradford to compete against us, should you, after that date, require oxygen from us, our price for same will be" another price "per thousand cubic feet, delivered on our Leeds Works—cash with order. We much regret that your attitude leaves us no alternative to the adoption of this course, but we have our own interests to consider, and feel that we have already done more to meet you in this matter than could reasonably be expected of us."

Unfortunately, this letter was handed over by Major Thornton, the managing director of Tanks & Drums, Ld., to a representative of the defendants. Having obtained possession of the letter the defendants caused twelve photographic reproductions of it to be made, and on January 2, 1925, sent one of the photographs to Messrs. Vickers da Costa & Co., a firm of stockbrokers on the London Stock Exchange, together with a letter in these terms: "We are sending you herewith a photograph of a letter written by the British Oxygen Co. to Messrs. Tanks & Drums, Ld., of Bradford. We are sending same with the view of you being able to convince yourselves and also our jobber friends, to what length our competitors are prepared to go in trying to bully firms into submission. It is noteworthy that only a few months ago the price to Messrs. Tanks & Drums from the B. O. C. was 37*s.* 6*d.* Where is their profit going to be? Major Thornton, who is addressed in this letter, has put same at our disposal in utter disgust, and rightly argues that if a firm can make such reductions on the appearance of competition what have they been doing in the past and what are they likely to do in the future if they could succeed in their obvious aim." In accordance with the request contained in this letter Messrs. Vickers da Costa & Co. showed the

photograph to one or two partners in a firm of stock jobbers called Oxley, Knox & Co.

The plaintiffs, when they discovered the use to which the defendants were putting the letter of December 17, 1924, after some little correspondence, issued their writ in this action, claiming a declaration that they are the owners of the copyright in the letter, and asking for the usual consequential relief. With the writ was served a notice of motion for an injunction. The notice of motion, while asking for an injunction based upon copyright, also claimed certain additional relief to which the plaintiffs could only be entitled on the footing that the letter was a confidential document. But at the hearing of the motion before me the plaintiffs, at the Bar, did not ask for this latter relief, but were content to base their claim upon copyright.

The jurisdiction to grant an injunction, at the instance of the writer of letters, to restrain the recipient from publishing the letters was established a long time ago. The publication of letters of Pope was restrained by Lord Hardwicke, as was the publication of Lord Chesterfield's letters by Lord Apsley.

In *Gee* v. *Pritchard* (1) Lord Eldon, notwithstanding some doubts expressed by Sir Thomas Plumer in *Lord Perceval* v. *Phipps* (2), found that the jurisdiction had been too well established by the cases before Lord Hardwicke and Lord Apsley to justify him in refusing to recognize its existence as, but for these cases, it would seem that he was inclined to do. Since *Gee* v. *Pritchard* (1) no one seems to have doubted the existence of the jurisdiction, and it has been recognized in numerous cases: see *Labouchere* v. *Hess* (3) and *Philip* v. *Pennell.* (4) In *Gee* v. *Pritchard* (1) and the two last mentioned cases the jurisdiction was not based upon statutory copyright which, before the Act of 1911, depended for its existence upon publication. Since the Copyright Act of 1911, however, statutory copyright exists in every original literary work, even though unpublished, so long as the author was, at the date of the making of the work,

(1) 2 Swans. 402.
(2) 2 V. & B. 19.
(3) 77 L. T. 559.
(4) [1907] 2 Ch. 577.

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a British subject or resident within the parts of His Majesty's Dominions to which the Act extends.

In the present case, therefore, the plaintiffs have statutory copyright in the letter if it be an original literary work. If it is not such a work, then it would seem to follow from s. 31 of the Act that the plaintiffs have no right to restrain its publication, unless such publication would be a breach of trust or confidence. Now it is said by the defendants that the letter is not a literary work. The meaning of the phrase "literary work," as used in the Act, was, however, considered by Peterson J. in the case of *University of London Press, Ld.* v. *University Tutorial Press, Ld.* (1) In that case the learned judge expressed himself as follows (2): "Although a literary work is not defined in the Act, s. 35 states what the phrase includes; the definition is not a completely comprehensive one, but the section is intended to show what, amongst other things, is included in the description 'literary work,' and the words are '"literary work," includes maps, charts, plans, tables, and compilations.' It may be difficult to define 'literary work' as used in this Act, but it seems to be plain that it is not confined to 'literary work' in the sense in which that phrase is applied, for instance, to Meredith's novels and the writings of Robert Louis Stevenson. In speaking of such writings as literary works, one thinks of the quality, the style, and the literary finish which they exhibit. Under the Act of 1842, which protected 'books,' many things which had no pretensions to literary style acquired copyright; for example, a list of registered bills of sale, a list of foxhounds and hunting days, and trade catalogues; and I see no ground for coming to the conclusion that the present Act was intended to curtail the rights of authors. In my view the words 'literary work' cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word 'literary' seems to be used in a sense somewhat similar to the use of the word 'literature' in political or electioneering literature and refers to written or printed matter. Papers set by examiners are, in my opinion, 'literary work' within

(1) [1916] 2 Ch. 601. (2) [1916] 2 Ch. 608.

the meaning of the present Act." With this statement of the learned judge I respectfully agree. I am accordingly of opinion that the letter in the present case, being written matter, is a "literary" work within the meaning of the present Act. If it be a literary work, I do not think that the defendants dispute that it is original, having regard to the meaning which Peterson J. attached to that word in the same case.

In the case of *Pope* v. *Curl* (1) Lord Hardwicke said (2): "It has been insisted on by the defendant's counsel, that this is a sort of work which does not come within the meaning of the Act of Parliament, because it contains only letters on familiar subjects, and inquiries after the health of friends, and cannot properly be called a learned work. It is certain that no works have done more service to mankind, than those which have appeared in this shape, upon familiar subjects, and which perhaps, were never intended to be published; and it is this makes them so valuable; for I must confess for my own part, that letters which are very elaborately written, and originally intended for the press, are generally the most insignificant, and very little worth any person's reading."

In *Gee* v. *Pritchard* (3) Lord Eldon, in recognizing the principle upon which the letters have been protected, said this (4): "I will not say that there may not be a case of exception, but if there is, the exception must be established on examination of the letters; and I think that it will be extremely difficult to say where that distinction is to be found between private letters of one nature, and private letters of another nature." This statement, coming as it does from Lord Eldon, must, I think, be regarded as an intimation of his opinion that no such distinction existed, and that one letter was as much entitled to protection as any other, even where there was no statutory copyright. But, however this may be, it appears to me that the letter in the present case being an original literary work within the

(1) (1741) 2 Atk. 342.
(2) 2 Atk. 343.
(3) 2 Swans. 402.
(4) 2 Swans. 426.

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meaning of the Act of 1911, the plaintiffs are entitled to copyright therein. That being so, it would be an infringement of such copyright to distribute photographic copies of such letter, and an injunction ought to be granted to restrain such infringement, unless the letter be of such a nature that the Court would refuse to interfere upon the principle recognized by Younger J. in *Glyn* v. *Weston Feature Film Co.* (1) and by Warrington J. in *Slingsby* v. *Bradford Patent Truck and Trolley Co.* (2) It is said by the defendants that having regard to this principle no injunction should be granted in the present case, inasmuch as the act of the plaintiffs, in writing and sending the letter to Tanks & Drums, Ld., was an act contrary to public policy, as being in restraint of trade, and that the plaintiffs were accordingly disentitled to protection. I am unable, however, to see how it can be said that there was anything unlawful or contrary to public policy in what the plaintiffs did. It appears to me that the plaintiffs did no more than what has always been regarded as a legitimate act in furtherance of a man's trade interests. In *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (3) Lord Halsbury, with reference to the facts of that case, said (4): "I have been unable to discover anything done by the members of the associated body of traders other than an offer of reduced freights to persons who would deal exclusively with them; and if this is unlawful it seems to me that the greater part of commercial dealings, where there is rivalry in trade, must be equally unlawful." In my opinion the plaintiffs were perfectly justified, in their endeavour to retain the custom of Tanks & Drums, Ld., in offering to supply that firm with oxygen on as low terms as they thought fit on condition that Tanks & Drums, Ld., agreed to take their oxygen exclusively from the plaintiffs, and not to manufacture, or to be concerned in the manufacture of, oxygen gas themselves.

The defendants further contended that the acts which they have done, and threatened to do, are acts that, having

(1) [1916] 1 Ch. 261.
(2) [1905] W. N. 122.
(3) [1892] A. C. 25.
(4) [1892] A. C. 36.

regard to the proviso in s. 2, sub-s. 1, of the Copyright Act, 1911, do not constitute an infringement of the plaintiffs' copyright. That proviso, so far as material for the present purpose, is in these terms: "Provided that the following acts shall not constitute an infringement of copyright: (i.) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary." I am inclined to agree with Mr. Upjohn that, in this proviso, the word "criticism" means a criticism of a work as such. But I need not consider this further, and for this reason; the Act no doubt extends to unpublished as well as published works, and, accordingly, this permission of criticism would seem at first sight to extend to unpublished literary works. The permission was no doubt necessary in the case of unpublished dramatic and musical works, inasmuch as performance in public of such works is not publication for the purposes of the Act. But it would be manifestly unfair that an unpublished literary work should, without the consent of the author, be the subject of public criticism, review or newspaper summary. Any such dealing with an unpublished literary work would not, therefore, in my opinion, be a "fair dealing" with the work. This being so s. 2, sub-s. 1, of the Act does not assist the defendants. In any case I cannot see that it was necessary for the defendants, for the purposes of criticism, to have photographic copies of the work prepared, and to send one of those copies to a broker on the London Stock Exchange for perusal by him and by the defendants' jobber friends.

The defendants finally contended that their object in taking copies of the letter, and sending one of such copies to their brokers, was to vindicate themselves and clear their character which, they alleged, had been unfairly attacked by the plaintiffs. In cases before the Act of 1911 the right to publish a letter, written by another, for the purpose of vindicating the publisher's own character was no doubt recognized: see *Lord Perceval* v. *Phipps* (1) and *Labouchere* v. *Hess.* (2) Whether in cases falling within the Act of 1911 any such

(1) 2 V. & B. 19.
(2) 77 L. T. 559.

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right exists may be doubted. I need not however pursue this matter further, because it is clear from the letter of January 2, 1925, that the object of the defendants was not to vindicate themselves or clear their own character, but to attack the commercial character of the plaintiffs. In the course of the struggle between the plaintiffs and the defendants for commercial supremacy each side has adopted methods of warfare that the other considers to be grossly unfair. The defendants allege that their conduct in relation to the letter in question is no worse from a moral point of view than some of the acts of the plaintiffs themselves. As to this I am not, I conceive, called upon to express any opinion. It is admitted by the defendants that these acts of the plaintiffs, other than the writing and sending of this letter with which I have already dealt, are not unlawful acts. On the other hand the acts of the defendants in connection with the letter are in my opinion unlawful. In the circumstances, therefore, it seems to me that I must grant an injunction restraining the defendants from publishing, printing, circulating or exhibiting or authorizing to be published, printed, circulated or exhibited the letter in question, or from otherwise infringing the plaintiffs' copyright therein. As the parties have agreed to treat the motion as the trial of the action there must also be an order for delivery up to the plaintiffs of any copies of photographic reproductions of the letter in the possession of the defendants, and the defendants must pay the costs of the action.

Solicitors for the plaintiffs: *Sharp & Benest.*

Solicitors for the defendants: *Kimber Bull, Howland, Clappé & Co.*

P. J. B.

TAYLOR *v.* BRITISH LEGAL LIFE ASSURANCE COMPANY, LIMITED.

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Jan. 22, 23, 27, 29, 30.

[1924. T. 1653.]

Landlord and Tenant—Lease of First Floor reserving Passage of Pipes through demised Premises—Lease of Second Floor with Right of Passage of Pipes through other Parts of Building—Right to install additional Pipes—Right to select Mode of Installation—Excessive User—Exercise of Right with minimum Disturbance and Inconvenience.

Where the lessee of an upper floor of a building has the right of carrying water and other pipes through the rooms of the floor beneath his own, the owner of the servient tenement is not exclusively entitled to select the mode in which the right shall be exercised, nor does the lessee of the dominant tenement necessarily discharge his obligation to the owner of the servient tenement by merely adopting such a system of drainage as a person of reasonable and ordinary skill and experience would have selected. The true principle to be applied is, that the lessee must exercise his right in such a way as to cause the minimum loss, disturbance and annoyance to the lessee of the lower floor.

Cases relating to the right of selecting a way, as, for instance, *Bolton* v. *Bolton* (1879) 11 Ch. D. 968; *Deacon* v. *South Eastern Ry. Co.* (1889) 61 L. T. 377; and *Abson* v. *Fenton* (1823) 1 B. & C. 195, although not strictly analogous, furnish a guide.

WITNESS ACTION.

By lease, dated May 18, 1923, the lessors therein named demised to the defendants all those rooms and premises (thereinafter called "the demised premises") consisting of the first floor and a portion of the basement forming and being part of the building known as Imperial Court, Brompton Road, Knightsbridge, in the county of London, which premises were more particularly delineated on the plans annexed to the lease and therein coloured pink, with the appurtenances excepting and reserving unto the lessors and the person or persons for the time being occupying the other parts of the building the "passage of gas, water and other pipes and electric wires through the demised premises and the free running of water and soil in and through the pipes connected with the demised premises."

By lease, dated May 27, 1924, the same lessors demised to the plaintiff all those premises (thereinafter called "the

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demised premises") consisting of portions of the second floor and mezzanine floor forming and being part of Imperial Court with the appurtenances and to be used as an addition to Basil Street Hotel of the lessee together with (amongst other rights) (*c*) free passage of gas, water and other pipes and telephone and electric wires between the demised premises and Basil Street Hotel and through other parts of the building of Imperial Court and (*d*) free running of water and soil through the pipes connected with such other parts of Imperial Court: and then there followed the same exception and reservation unto the lessors (mutatis mutandis) as was contained in the lease to the defendants.

Imperial Court consisted of a large building having a frontage to the north on Brompton Road and to the south on Basil Street. It contained a basement and ground floor occupied chiefly by shops, a mezzanine floor, a first floor and second and third floors above. At the date of the defendants' lease the second and third floors were occupied as offices in connection with Government departments, but were expected shortly to become vacant. A rain water stack pipe connecting with the gutter on the Basil Street frontage ran on the outside of the building until very nearly the level of the floor of the defendants' premises. It then entered those premises in order to connect with the sewers below. In addition there were in the lavatory on the north side of the defendants' premises certain water pipes and a gas pipe, those water pipes serving the lavatory basins and water-closets and also going through the lavatory to the floors above, the gas pipe serving a geyser in the lavatories, but not proceeding onward to the upper floors. There were also pipes serving a lavatory on the south side. On the south side the lavatory contained washing basins and water-closet accommodation, and there were pipes leading into the defendants' premises from below connecting with the water-closets and basins.

The plaintiff, who acquired the lease of the second floor for the purpose of using it in connection with her adjoining hotel premises, in the course of converting that floor into eight bedrooms with a water-closet and bathroom attached

to each, adopted a system of drainage along the walls of the defendants' premises, in the opinion of the Court, wholly regardless of its effect upon the defendants' premises. The system, broadly stated, had been to conduct the pipes on the northern part of the building comprising the pipes leading from four water-closets and four baths through the floor of the plaintiff's premises into the defendants' premises, there to connect two of the water-closets and two of the baths close to the ceiling and then run the so connected pipes down to the floor level of the defendants' rooms and then to conduct them horizontally along the floor until they left the defendants' premises; and that process had been repeated in the case of the other sets of water-closets and baths in the northern part. As regards the southern part a similar system had been adopted leading the pipes eventually to the south of the building.

Early in September, 1924, after the work had been in hand for several weeks and was nearing completion, the defendants cut the pipes: and thereupon this action was commenced, in which the plaintiff claimed that the defendants might be restrained by injunction from cutting or otherwise interfering with the pipes or other works and from excluding the plaintiff or persons authorized by her for the purpose from entering the defendants' premises for the purpose of laying, altering or repairing the pipes or other works, and for damages. It was not contended that the defendants had consented to waive any rights they might have under their lease; and, although evidence was given at the trial to prove that, through the conduct of some of their employees, the defendants had assented to or subsequently acquiesced in the installation of the pipes, the Court held that there had been no assent or acquiescence which bound the defendants. Evidence also was given on behalf of the defendants to prove that the plaintiff's system of drainage was unreasonably burthensome, and that a less inconvenient system might have been and might be adopted at a comparatively slight additional cost.

The arguments by counsel on the first question which arose for the decision of the Court (namely, whether upon the

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proper construction of the lease to the defendants the reservation to the lessors of the passage of pipes through the defendants' premises operated so as to reserve a general right extending to additional pipes or operated merely as an exception of existing pipes) are not reported, as the second question—namely, whether the system of drainage which the plaintiff had installed in the defendants' premises was unreasonably burthensome—is the only question material to this report.

Owen Thompson K.C. and *Swords* for the defendants. Assuming that the plaintiff has established her right to pass additional pipes through the defendants' premises, she has acted in excess of her rights by installing in the defendants' premises a system of drainage which throws an unnecessary burden upon the defendants. Where there is a grant and an exception out of it, the exception will be taken to have been inserted for the benefit of the grantor and will be construed in favour of the grantee: *Savill Brothers* v. *Bethell.* (1) The grantor or owner of the servient tenement is the person entitled to select the direction and arrangement of the pipes. In cases where a right of way is involved, whether it be the case of a way of necessity or where the way is undefined, the grantor has the right to select the way: Gale on Easements, 10th ed., p. 178; *Bolton* v. *Bolton* (2); *Deacon* v. *South Eastern Ry. Co.* (3); and the principle of those cases is also applicable to the present case of a right to pass pipes through the defendants' premises. The plaintiff is not entitled to run the pipes through the defendants' premises by means of the inconvenient method which she has adopted, allowing the pipes to stray about the rooms: *Senhouse* v. *Christian* (4), where it was held in the case of a grant of way for carrying coals from A. to B. in through and along a particular slip of land that the grantee was not entitled to make a transverse road across that slip. *Abson* v. *Fenton* (5) was a case of a

(1) [1902] 2 Ch. 523.
(2) 11 Ch. D. 968.
(3) 61 L. T. 377.
(4) (1787) 1 T. R. 560.
(5) 1 B. & C. 195.

right of way [a way of necessity]: there was a reservation to the lord of all mines together with all "convenient and necessary" ways then already made or thereafter to be made; the way was not from one definite point to another. The case is, therefore, distinguishable; but it shows that the mode adopted must be such a mode as a prudent and rational person would have adopted if he had been bringing the pipes through his own premises. *Morris* v. *Edgington* (1) was a case of a way of necessity.

Jenkins K.C. and *Warwick Draper* for the plaintiff. It is difficult to apply the principle laid down in *Abson* v. *Fenton* (2), which was a case of a right of way, to the present case of a right to lay pipes through another's property, but some light is thrown on the subject by that case. The true test is whether the plaintiff has acted in the same manner as a person of reasonable and ordinary skill and experience would have acted and whether she has adopted a scheme which she would have adopted, had she been the owner of the defendants' premises. The evidence has shown that the plaintiff has satisfied that test.

LAWRENCE J. [stated the facts as above set forth, and having decided that, upon the true construction of the lease, the reservation to the lessors of the passage of gas, water and other pipes operated so as to reserve a general right to cause gas, water and other pipes and electric wires to pass through the defendants' premises and not merely as an exception from the lease of the then existing pipes, proceeded as follows:] The next question is, whether the plaintiff has acted in excess of the rights reserved by the defendants' lease. Mr. Owen Thompson has referred to two cases concerning rights of way —namely, *Bolton* v. *Bolton* (3) and *Deacon* v. *South Eastern Ry. Co.* (4)—in support of his contention, that, in a case like this, the right of conducting pipes through the defendants' premises was a right which could only be exercised by placing the pipes in such a position as the defendants might select;

(1) (1810) 3 Taunt. 24.
(2) 1 B. & C. 195.
(3) 11 Ch. D. 968.
(4) 61 L. T. 377.

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in other words, that the owner of the servient tenement has the complete direction of the manner and mode in which the right should be exercised. Mr. Jenkins, on the other hand, has referred me to another case concerning a right of way—namely, *Abson* v. *Fenton* (1)—and especially to the judgment of Abbott C.J. in support of his contention that the plaintiff is entitled to exercise her right by placing the pipes in such a position as a person of reasonable and ordinary skill and experience would have selected beforehand, although the manner in which the right has been exercised is not such as, after consideration, would have been recommended by persons of the highest degree of skill and experience. The right of way cases, although useful in furnishing a guide to the ascertainment of the rights of the parties in the present case, are not strictly analogous to the case of the right to affix pipes to the walls of the servient tenement for the passage of water and soil through such tenement. In my judgment, the true view, in the present circumstances, is intermediate between the two contentions advanced by counsel. The owner of the dominant tenement must exercise his right in such a way as not to cause any unnecessary inconvenience, annoyance, disturbance or injury to the owner of the servient tenement. If full effect were to be given to the contention of the plaintiff, the reservation might, in my opinion, operate so as to impose an intolerable burden on the defendants, as the right might be exercised so as to appreciably diminish the amenity and value of the servient tenement. If the true measure of the rights of the plaintiff under this reservation were as large as contended for, it would go a long way towards supporting the argument that such a reservation could never have been intended and that the reservation ought not to be construed in the way in which I have construed it. In a case like the present, I think it is obvious that the right reserved to the lessors for the benefit of the upper floor must be exercised in such a way (consistently with the reasonable exercise of the right) as to cause the minimum loss, disturbance and annoyance to the lessee of the lower floor. It

(1) 1 B. & C. 195, 203.

would be strange if a lessor could, under such a reservation, affix soil pipes to the walls of rooms laid out as drawing rooms or dining rooms or even as offices, regardless of the convenience of the occupiers of those rooms.

Having stated my view as to the law to be applied, I come to the consideration of the facts. [His Lordship then stated the arrangement adopted by the plaintiff in affixing the pipes to the defendants' premises and proceeded as follows:] Now if that had been necessary in order to exercise the right reserved, the defendants would have had to put up with it, but the evidence has convinced me that a system of sewage and waste water disposal by means of pipes leading through the defendants' premises could have been formulated and could have been selected beforehand by any ordinary reasonably skilled person which, whilst being quite as efficient as the one which has in fact been selected, would have avoided any substantial injury or annoyance to the defendants. The evidence has convinced me and I find as a fact, that either of the two systems shown on plans D.2 and D.5, although possibly costing a trifle more, would, if it had been adopted, have accomplished everything that has been accomplished by the present system without causing unnecessary injury and annoyance to the defendants.

Having come to this conclusion, it follows that the defendants were justified in cutting the pipes which have been conducted through their premises, unless they have assented to or acquiesced in what the plaintiff has done. It is not suggested that the defendants consented to waive any rights which they might have under their lease. It is, however, contended that the defendants, through their servants, acquiesced in the placing of the pipes under the drainage system evolved by the plaintiff. [His Lordship then dealt with the question of acquiescence in the placing and arrangement of the pipes with which the plaintiff had charged the defendants, and came to the conclusion that, on the evidence, there had been no such acquiescence as was binding on the defendant company. He, accordingly, made a declaration that the water and soil pipes which had been carried by the

LAWRENCE J. 1925 TAYLOR v. BRITISH LEGAL LIFE ASSURANCE CO.

plaintiff through the defendants' premises were so constructed and arranged as to impose a burden upon the defendants' premises in excess of the burden which the plaintiff in exercise of her right was entitled to impose thereon, and that the plaintiff accordingly acted in excess of such right and was not entitled to maintain the pipes as the same had been placed and arranged by her in the defendants' premises, and ordered that the plaintiff and the defendants should bear their own costs of the action.]

Solicitors for the plaintiff: *Rye & Eyre.*

Solicitors for the defendants: *A. J. Greenop & Co.*

H. C. H.

NOTE.

1925. April 30; May 1. The plaintiff appealed, and there was a cross-appeal by the defendants. The cross-appeal upon the question of the construction of the reservation in the lease was first heard, as the question involved in the plaintiff's appeal would not arise if the defendants succeeded in their cross-appeal.

The Court (Pollock M.R., Warrington and Sargant L.JJ.) in allowing the cross-appeal held that the reasonable construction to put upon the reservation clause in the defendants' lease, was that it applied only to pipes existing at the date of the lease and did not extend to future pipes. As the respondents therefore had succeeded on their cross-appeal, the point raised by the plaintiff's appeal did not arise. It was therefore unnecessary to consider it, and that appeal would accordingly be dismissed.

W. I. C.

ASTBURY J.
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May 8.

In re IOAKIMIDIS' POLICY TRUSTS.

IOAKIMIDIS *v.* HARTCUP.

[1924. I. 2851].

Insurance (Life)—Husband's endowment Policy—Benefit expressed for Wife if Husband die before Policy matures, leaving her Surviving—Validity of contingent Benefit—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 11.

A husband effected a life or twenty years' endowment policy with an insurance society, the money being payable on his death or on his surviving the twenty years.

The policy was expressed to be for the benefit of his wife if he died within the twenty years leaving her surviving, otherwise for the benefit of himself or his estate.

The husband died within the twenty years leaving his wife surviving:—

Held, that the policy though immediately payable if the husband survived the twenty years was a policy effected "on his own life" within s. 11 of the Married Women's Property Act, 1882.

Held, also, that in the event that had actually occurred a valid trust for the wife was created within that section.

Witness Action.

By a policy dated June 7, 1918, effected by a husband with the Norwich Union Life Insurance Society after reciting that the husband had agreed to effect an insurance for the benefit of his wife (only in the event of his death before May 28, 1938, leaving her surviving) under the Married Women's Property Act, 1882, in the sum of 1500*l.* at a yearly premium of 78*l.* the society undertook that if the first premium should be paid within twenty-one days and the subsequent premiums on each subsequent May 28 during the husband's life until and including May 28, 1937, the society's funds should be liable after satisfactory proof of the husband's death or upon his surviving May 28, 1938, to the payment of 1500*l.*, such sum to be paid to the husband or his executors, administrators or assigns upon his surviving May 28, 1938, or to be paid to the trustees for the time being entitled to give a receipt for the same for the benefit of the wife in the event of his death before that date leaving her

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surviving; otherwise to be paid to the husband's executors, administrators or assigns.

The husband paid the first and the wife the subsequent premiums.

On January 23, 1924, the husband died at Athens intestate leaving his wife surviving. As no trustees had been appointed and the wife was in Athens the defendant as her attorney took out administration to the husband's estate on July 7, 1924, and received the policy moneys and bonuses, amounting to 1600*l.*, on July 10. He had paid 48*l.* estate duty on this amount and no other assets had come to his hands. The wife claimed these policy moneys.

The defendant, though willing to pay these moneys (less estate duty, professional charges, and costs charges or expenses incurred in connection with the policy) to the wife if she could give him a proper receipt, was advised that it was doubtful whether s. 11 of the Married Women's Property Act, 1882 (1), applied to endowment policies, especially

(1) The Married Women's Property Act, 1882, provides as follows: Sect. 11: "..... A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or new trustees, a trustee or trustees or a new trustee or new trustees may be appointed by any Court having jurisdiction under the provisions of the Trustee

where the wife if surviving only took an interest if the husband died before the policy matured, the husband or his estate being otherwise entitled to the moneys. Having regard to possible claims on the husband's estate the defendant was therefore unwilling to part with the moneys without the Court's order.

On October 9, 1924, the wife commenced this action for a declaration that the defendant was a trustee of the policy moneys and an order for payment. The defendant submitted the above points to the Court.

G. D. Johnston for the wife. This was a policy on the husband's life. It would only have ripened into an endowment if he had survived May 28, 1938. That is a policy within s. 11 : see Wolstenholme's Conveyancing Acts, 10th ed., p. 332, where *Prudential Insurance Co.* v. *Inland Revenue Commissioners* (1) is relied on.

[ASTBURY J. An endowment policy is clearly a life policy. (2)]

J. W. F. Beaumont and *Marcus Overton* for the husband's administrator. The only declaration of trust is in s. 11. Unless that section applies, the wife, not being a party to the policy, would have no claim. There is direct authority on that point. (3)

Now this policy is not within s. 11, for two reasons :—

(*a*) It is not a policy on the husband's life simpliciter : see "Definition of Life Insurance" in Halsbury's Laws of England, vol. xvii., p. 543. The husband's life is no doubt insured for twenty years, but then the life policy ceases and becomes an endowment immediately payable to him.

Act, 1850, or the Acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part."

(1) [1904] 2 K. B. 658.

(2) See *Gould* v. *Curtis* [1913] 3 K. B. 84.

(3) See *Cleaver* v. *Mutual Reserve Fund Life Association* [1892] 1 Q. B. 147 and *In re Engelbach's Estate* [1924] 2 Ch. 348.

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(*b*) The policy is not expressed to be for the benefit of the wife simpliciter, but only in a certain event—namely, if her husband dies during the twenty years leaving her surviving. In any other event it expressly goes to the husband or his estate. In the latter case it is clearly outside s. 11. But a policy cannot be partly within and partly outside the section according to the event that occurs: Macgillivray on Insurance, pp. 555, 556. The section is therefore inapplicable.

G. D. Johnston in reply. In the event that occurred the policy remained a life policy throughout, and a valid trust for the wife was created within s. 11. The fact that in other events it might have ripened into an endowment for the husband is immaterial. A contingent benefit is within the section: *Griffiths* v. *Fleming*. (1)

ASTBURY J. [after stating the facts and reading s. 11:] At one time it was a question whether an endowment policy expressed to be for the benefit of the insured husband's wife or children was within s. 11 at all. In my judgment it is an ordinary life policy with the benefit of acceleration in a specified event, and I feel no doubt it is a policy effected by the husband on his own life.

In the present case the benefit expressed for the wife was operative only in a specified event—namely, in the event of the husband dying before May 28, 1938, leaving her surviving. That in my opinion was a policy effected by the husband on his own life and expressed to be for the benefit of the wife in the event mentioned. It created a statutory trust for the wife in that event only—namely, if the husband died before May 28, 1938, leaving her surviving.

A text writer has raised the question whether a policy can be partly within and partly outside s. 11 according to the event that occurs. This is a policy of that character. In my opinion so far as it expressed a benefit for the wife in the event that has occurred, it created a valid and effectual trust under s. 11.

There will therefore be a declaration that the defendant

(1) [1909] 1 K. B. 805, 818, 819.

is a trustee of the policy moneys for the wife and an order for payment thereof to her of the balance remaining after defraying estate duty, costs charges and expenses reasonably incurred in connection with the policy, and the costs of the action.

Solicitors: *Ballantyne, Clifford & Co.; Collisson, Prichard & Barnes.*

G. R. A.

In re CITY EQUITABLE FIRE INSURANCE COMPANY, LIMITED.

[No. 0048 of 1922.]

Company—Winding Up—Misfeasance—Directors and Auditors—Duties—Investments—Loans—Signing Cheques—Inspection and Safe Custody of Securities—Declaration of Dividends—Fraud of Managing Director—Clause in Articles exempting Directors and Auditors from Liability—"Wilful Neglect or Default"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 113, 215, 279.

In the winding up by the Court of the above mentioned company an investigation of its affairs disclosed a shortage in the funds, of which the company should have been possessed, of over 1,200,000*l.*, due in part to depreciation of investments, but mainly to the instrumentality of the managing director and largely to his deliberate fraud, for which he had been convicted and sentenced.

Art. 150 of the company's articles of association provided (inter alia) that none of the directors, auditors, secretary or other officers for the time being of the company should be answerable for the acts, receipts, neglects or defaults of the others or other of them, or for any bankers or other persons with whom any moneys or effects belonging to the company should or might be lodged or deposited for safe custody, or for insufficiency or deficiency of any security upon which any moneys of or belonging to the company should be placed out or invested, or for any other loss, misfortune, or damage which might happen in the execution of their respective offices or trusts, or in relation thereto, unless the same should happen by or through their own wilful neglect or default respectively.

On a misfeasance summons under s. 215 of the Companies (Consolidation) Act, 1908, the Official Receiver as liquidator sought to make the respondent directors, all of whom (except the managing director) had admittedly acted honestly throughout, liable for negligence in respect of losses occasioned by investments and loans, and of payment of dividends out of capital.

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In determining the questions of the liability of the respondent directors raised by the summons, Romer J. enunciated and adopted the following principles relative to the duties of directors and to the meaning to be attached to the words "wilful neglect or default" in art. 150.

Duties of Directors.—The manner in which the work of a company is to be distributed between the board of directors and the staff is a business matter to be decided on business lines. The larger the business carried on by the company the more numerous and the more important the matters that must of necessity be left to the managers, the accountants, and the rest of the staff.

In ascertaining the duties of a director of a company, it is necessary to consider the nature of the company's business and the manner in which the work of the company is, reasonably in the circumstances and consistently with the articles of association, distributed between the directors and the other officials of the company.

In discharging those duties, a director (*a*) must act honestly, and (*b*) must exercise such degree of skill and diligence as would amount to the reasonable care which an ordinary man might be expected to take, in the circumstances, on his own behalf. But, (*c*) he need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience; in other words, he is not liable for mere errors of judgment; (*d*) he is not bound to give continuous attention to the affairs of his company; his duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee to which he is appointed, and though not bound to attend all such meetings he ought to attend them when reasonably able to do so; and (*e*) in respect of all duties which, having regard to the exigencies of business and the articles of association, may properly be left to some other official, he is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

Overend & Gurney Co. v. *Gibb* (1872) L. R. 5 H. L. 480; *Lagunas Nitrate Co.* v. *Lagunas Syndicate* [1899] 2 Ch. 392; *In re National Bank of Wales* [1899] 2 Ch. 629; [1901] A. C. 477 (sub nom. *Dovey* v. *Cory*); and *In re Brazilian Rubber Plantations and Estates, Ld.* [1911] 1 Ch. 425, applied.

A director who signs a cheque that appears to be drawn for a legitimate purpose is not responsible for seeing that the money is in fact required for that purpose, or that it is subsequently applied for that purpose, assuming, of course, that the cheque comes before him for signature in the regular way, having regard to the usual practice of the company. A director must of necessity trust to the officials of the company to perform properly and honestly the duties allocated to them.

Before any director signs a cheque, or parts with a cheque signed by him, he should satisfy himself that a resolution has been passed by the board, or committee of the board (as the case may be), authorizing the signature of the cheque; and where a cheque has to be signed between meetings, he should obtain the confirmation of the board subsequently to his signature.

The authority given by the board or committee should not be for the signing of numerous cheques to an aggregate amount, but a proper

list of the individual cheques, mentioning the payee and the amount of each, should be read out at the board or committee meeting and subsequently transcribed into the minutes of the meeting.

Joint Stock Discount Co. v. *Brown* (1869) L. R. 8 Eq. 381 distinguished.

It is the duty of each director to see that the company's moneys are from time to time in a proper state of investment, except so far as the articles of association may justify him in delegating that duty to others.

Before presenting their annual report and balance sheet to their shareholders, and before recommending a dividend, directors should have a complete and detailed list of the company's assets and investments prepared for their own use and information, and ought not to be satisfied as to the value of their company's assets merely by the assurance of their chairman, however apparently distinguished and honourable, nor with the expression of the belief of their auditors, however competent and trustworthy.

It is not the duty of a director of a big insurance company to supervise personally the safe custody of the securities of the company. It would be impracticable, on every purchase of securities, for actual delivery thereof to be made to the directors, or, on every sale, for the delivery to the brokers of the securities sold to await a meeting of the board or of a committee of directors. The duty of seeing that the securities are in safe custody must of necessity be left to some official of the company in daily attendance at the office of the company, such as the manager, accountant, or secretary.

A director is not responsible for declaring a dividend unwisely. He is liable if he pays it out of capital, but the onus of proving that he has done so lies upon the liquidator who alleges it.

Wilful Neglect or Default.—An act, or an omission to do an act, is wilful where the person who acts, or omits to act, knows what he is doing and intends to do what he is doing, but if that act or omission amounts to a breach of that person's duty, and therefore to negligence, he is not guilty of wilful neglect or default unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of his duty.

Lewis v. *Great Western Ry. Co.* (1877) 3 Q. B. D. 195; *Forder* v. *Great Western Ry. Co.* [1905] 2 K. B. 532; and *Leeds City Brewery, Ld.* v. *Platts*, post, p. 532n., applied.

This statement of the meaning of "wilful neglect or default" was subsequently approved by Warrington and Sargant L.JJ. in the Court of Appeal on the Official Receiver's appeal against Romer J.'s decision exonerating the auditors:—

Held, (1.) Following *In re Brazilian Rubber Plantations and Estates, Ld.* [1911] 1 Ch. 425, that the immunity afforded by art. 150 was one of the terms upon which the directors held office in the company, and availed them as much on a misfeasance summons by the Official Receiver under s. 215, as it would have done in an action by the company against them for negligence; and

(2.) Upon the evidence and in accordance with the principles enunciated above, that none of the respondent directors (other than the managing

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director) was liable for the losses covered by the points of claim, and that in those instances in which all or some of the directors had been guilty of negligence, such negligence was not wilful and art. 150 applied to exonerate them from liability.

On the same misfeasance summons the Official Receiver sought to make the respondent auditors liable for negligence and breach of duty with respect to the audit by them of the balance sheets for the three years immediately previous to the winding up.

In determining the question of liability of the respondent auditors raised by the summons, Romer J. applied the principles enunciated by Lindley L.J. in *In re London and General Bank* (*No.* 2) [1895] 2 Ch. 673 and also the following further principles relative to the duties of auditors.

An auditor is not ever justified in omitting to make personal inspection of securities that are in the custody of a person or company with whom it is not proper that they should be left, whenever such personal inspection is practicable.

A company's stockbrokers, however respectable and responsible they may be, are not proper persons to have the custody of its securities except on such occasions when, for short periods, securities must of necessity be left with them; but immediately such necessity ceases the securities should be lodged in the company's strong room or with its bank, or placed in other proper and usual safe keeping.

Whenever an auditor discovers that securities of the company are not in proper custody, it is his duty to require that the matter be put right at once, or, if his requirement is not complied with, to report the fact to the shareholders, and this whether he can or cannot make a personal inspection:—

Held, on the evidence and in accordance with the principles enunciated above: (1.) that the auditors were not guilty of any breach of duty as auditors—

(*a*) In describing, after a full investigation in which they were misled and deceived, and their reports to the board suppressed, by the chairman of the company, large sums of money left in the hands of the company's stockbrokers and lent to the general manager of the company as "Loans at call or short notice," "Loans" or "Cash at hand and in bank"; or

(*b*) In failing to discover that the company's stockbrokers, in order to reduce their indebtedness to the company for the purposes of the audit, made purchases, on behalf of the company, immediately before the close of the company's financial year, of Treasury Bills which in fact never came into the possession of the company and were sold immediately the new financial year had opened.

(2.) That the auditors committed a breach of duty in not personally inspecting the securities of the company in the hands of the stockbrokers of the company, and in accepting from time to time the certificate of the brokers that they held large blocks of such securities, and in not either insisting upon those securities being put in proper custody or in reporting the matter to the shareholders; but that inasmuch as throughout the audit the auditors honestly and carefully discharged what they conceived to be the whole of their duty to the company,

such negligence was not wilful, and art. 150 applied to exonerate them from liability.

On the appeal of the Official Receiver from the above decision so far only as it affected the respondent auditors,

The Court (Pollock M.R., Warrington and Sargant L.JJ.), in affirming as a whole the decision of Romer J.:—

Held, (1.) That s. 215 was a procedure section only and created no new or additional liability.

(2.) That the measure of the auditor's responsibility depends upon the terms of his engagement. There may be a special contract defining the duties and liabilities of the auditors. If there is, then that contract governs the question. The articles will, however, be looked at if there is no special agreement, because the auditors will presumably have taken their duties upon the terms (among others) set out in the articles. That is not to say that auditors can set aside a statutory obligation. No agreement or article of association can remove an imperative or statutory duty.

(3.) Sect. 113 does not lay down a rigid code. The duty imposed on the auditors by it is not absolute, but depends upon the information given and explanations furnished to them, so that there is abundant scope for discretion. Art. 150 is not in conflict with the section. The onus lies upon the auditors, who would not be excused for total omission to comply with any of the requirements of the section, or for any consequences of deliberate or reckless indifferent failure to ask for information on matters which call for further explanation.

(4.) Auditors should not be content with a certificate that securities are in the possession of a particular company, firm, or person unless the company, etc., is trustworthy, or, as it is sometimes put, respectable, and further is one that in the ordinary course of business keeps securities for its customers. In all these cases the auditor must use his judgment.

The definition of "wilful misconduct" by Lord Alverstone C.J. in *Forder* v. *Great Western Ry. Co.* [1905] 2 K. B. 532, 536, adopted by Pollock M.R.

Quaere, whether in the particular circumstances of the case, apart from art. 150, there was negligence on the part of the auditors (as held by Romer J.) in not personally inspecting the securities which were in the possession of the company's stockbrokers and in accepting their certificate instead.

ADJOURNED SUMMONS.

The City Equitable Fire Insurance Company, Ld. (hereinafter referred to as "the company"), was incorporated on December 17, 1908, under the Companies Acts, 1862 to 1907, and the objects of the company were to carry on every kind of insurance and reinsurance business other than life assurance and employers' liability insurance. The original capital of the company was 50,000*l.*, divided into 10,000 ordinary shares of 5*l.* each, but this was subsequently increased to

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375,000*l.* by the creation of 300,000 preference shares and additional 25,000 ordinary shares of 1*l.* each respectively.

The objects for which the company was established included also power: (12.) to lend deposit or advance money on securities and property to or with such persons and on such terms as might be expedient; (14.) to amalgamate or enter into partnership or any arrangement for sharing profits, union of interests, joint adventure, reciprocal concessions or co-operation with any person or company carrying on or engaged in or about to carry on or engage in any business or transactions which the company was authorized to carry on or engage in; (15.) generally to purchase, take on lease, or in exchange, hire or otherwise acquire any real or personal property; and (18.) to accumulate capital for the purposes of the company and to invest and deal with the moneys of the company upon such stocks, funds, shares, securities and investments and in such manner as might from time to time be determined.

The articles of association of the company so far as material for the purposes of this report provided as follows:—

Art. 106. "All moneys, bills and notes belonging to the company shall be paid to or deposited with the company's bankers to an account to be opened in the name of the company. Cheques on the company's bankers, unless and until the directors shall otherwise from time to time resolve, shall be signed by at least two directors and countersigned by the secretary."

Art. 120. "The directors or any committee of directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. Until otherwise determined two shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote."

Art. 123. "The directors may delegate any of their powers, other than the powers to borrow and make calls, to committees consisting of such members of their body as they think fit.

Any committee so formed shall in the exercise of the power so delegated conform to any regulations that may from time to time be imposed upon them by the Board."

Art. 139. "A balance sheet shall be made out in every year and laid before the company in general meeting. Such balance sheet shall be made up to a date not more than three months before such meeting, and shall be accompanied by a report of the directors as to the state of the company's affairs and the amounts (if any) which they recommend to be paid in dividend or propose to carry to reserve. . . . ."

Art. 140. "Once at least in every year the accounts of the company shall be examined, and the correctness of the profit and loss account and balance sheet ascertained by one or more auditor or auditors."

Art. 141. "The appointment, powers, rights, remuneration and duties of the auditors shall be regulated by ss. 112 and 113 of the Companies (Consolidation) Act, 1908, and any statutory modification, extension or re-enactment thereof for the time being in force."

Art. 150. "The directors, auditors, secretary and other officers for the time being of the company, and the trustees (if any) for the time being acting in relation to any of the affairs of the company, and every of them, and every of their heirs, executors and administrators, shall be indemnified and secured harmless out of the assets and profits of the company from and against all actions, costs, charges, losses, damages and expenses which they or any of them their or any of their heirs, executors or administrators shall or may incur or sustain by or by reason of any act done, concurred in or omitted in or about the execution of their duty, or supposed duty, in their respective offices or trusts, except such (if any) as they shall incur or sustain by or through their own wilful neglect or default respectively, and none of them shall be answerable for the acts, receipts, neglects or defaults of the other or others of them, or for joining in any receipts for the sake of conformity, or for any bankers or other persons with whom any moneys or effects belonging to the

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company shall or may be lodged or deposited for safe custody, or for insufficiency or deficiency of any security upon which any moneys of or belonging to the company shall be placed out or invested, or for any other loss, misfortune or damage which may happen in the execution of their respective offices or trusts, or in relation thereto, unless the same shall happen by or through their own wilful neglect or default respectively."

The constitution of the directorate of the company; the appointment of a finance committee with power to make or sell investments on behalf of the company; and the causes which on February 14, 1922, necessitated the making of an order upon the petition of the company for the winding up of the company by the Court, are set out in the following judgment of Romer J.

This was a summons by the liquidator under s. 215 of the Companies (Consolidation) Act, 1908, against the respondent directors and auditors.

The allegations against the respondent directors, were misfeasance, negligence, breach of trust and breach of duty for :—

(1.) The investment of 701,739*l.* of the company's moneys in certain investments set forth in the points of claim but confined at the hearing to a sum of 228,813*l.* invested in shares in Claridge's Hotel, Paris, which had, so far as realized, produced 67,557*l.*, the estimated value of those unrealized being 24,000*l.*, and to a sum of 70,970*l.* invested in shares of the United Brass Founders and Engineers, Ld., the estimated value of which was 1185*l.*;

(2.) The investment of 445,374*l.* in a ranch in Brazil;

(3.) Permitting E. G. Mansell, the general manager, and now a bankrupt, to become indebted to the company for 110,000*l.*, the whole of which was lost to the company;

(4.) Lending to or allowing to remain in the hands of Ellis & Co., the company's brokers and now bankrupt, the sum of 350,000*l.*, the greater part of which was lost to the company;

(5.) Lending to G. L. Bevan, the chairman of the company

and senior partner in Ellis & Co., who had since been adjudicated bankrupt and had been convicted and sentenced for his frauds on the company, the sum of 9329*l.*, which was lost to the company;

(6.) Lending to the Saskatoon Grain Company a sum of 9329*l.*, which had been wholly lost;

(7.) Paying dividends out of capital in respect of the financial year ending February 28, 1921, and

(8.) Paying an interim dividend out of capital in respect of the financial year ending February 28, 1922.

The allegations against the respondent auditors were that as auditors of the company they were guilty of negligence and breach of duty with respect to the audit by them of the balance sheets of the company for the years ended February 28, 1919; February 29, 1920; and February 28, 1921, in that—

(*a*) They failed to verify the existence in fact of any of the securities of which the company was therein stated to be possessed;

(*b*) They failed to see that the balance sheets respectively disclosed the indebtedness of Ellis & Co. to the company;

(*c*) They included moneys due from Ellis & Co. and from Mansell amongst the loans at call or short notice;

(*d*) They failed to see that the balance sheets respectively pointed out to the shareholders the fact that Ellis & Co. and Mansell were indebted to the company and the manner in which such indebtedness arose;

(*e*) They included as cash at the bank and in hand debts due from Ellis & Co. and moneys which were not the moneys of the company alone, and

(*f*) They failed to call attention to the fact that securities appearing in the balance sheets respectively as the property of the company were in fact hypothecated. This last allegation was withdrawn at an early stage of the hearing.

The Official Receiver claimed compensation from the auditors for the loss sustained by the company through their alleged negligence in respect of the above-mentioned matters.

The summons came on for hearing before Romer J. on February 4, 1924.

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Topham K.C., *C. A. Bennett K.C.* and *Harold Christie* for the Official Receiver as liquidator. No fraud is alleged against any of the respondents, except Bevan. The allegation against them is purely one of negligence, and the common law principle applies—namely, that where a person undertakes an operation which requires a certain amount of skill, he will be responsible for damaging results from his not exercising the amount of skill which a reasonable person, who is competent to carry out that transaction, would make use of. For example, a person acting as a director of a large insurance company is bound to exercise the skill that a reasonable person, competent to act in that way, would exercise, and he is not entitled to say that he knew nothing about business; that he was not a business man at all, and that he was there for some quite subsidiary purpose.

In the case of an insurance company the investment of the funds of the company is a most important matter, and we submit that the directors ought to ascertain from time to time what the investments are in which the funds under their control are invested, that they should provide some system for the care and custody of the investments which they hold, and that they ought to see that the investments are reasonably proper for the class of company of which they are directors.

Where directors take so little part in the management of the business of the company as to make it perfectly easy, without inquiry, for one of their number to dissipate the funds of the company then they ought to be liable for the consequences.

Directors are always held to be trustees of moneys in their hands or under their control: *In re Lands Allotment Co.* (1), and misapplication of those moneys through mistake or carelessness is a breach of trust for which they are liable quite apart from any question of misfeasance.

When a director undertakes a certain transaction requiring any special skill, he must exercise the skill ordinarily used by persons who are transacting that particular thing: *Jones* v.

(1) [1894] 1 Ch. 616.

Bird. (1) Even if these directors were not expected to exercise special skill, the disastrous result would not have occurred if they had exercised the ordinary care of an ordinary man in his own business. They left the investment of the funds of the company in the hands of one man, Bevan, and in so doing were guilty of negligence: *Charitable Corporation* v. *Sutton*. (2)

Where a director signs a cheque under a provision in the articles saying that two directors must sign, he is prima facie liable to see that he has signed for a proper purpose; but if it is signed in pursuance of a resolution of the Board, that would throw the responsibility on to those who passed the resolution; *Joint Stock Discount Co.* v. *Brown*. (3) Payment of dividends is another specific act which shifts the burden of proof on to the directors of showing that they were in fact paid out of profits: *Leeds Estate, Building and Investment Co.* v. *Shepherd*.(4)

The duty of an auditor, as stated by Lindley L.J. in *In re London and General Bank (No. 2)* (5), is to "check the cash, examine vouchers for payments, see that the bills and securities entered in the books were held by the bank, and take reasonable care to ascertain their value." The auditors in this case have fallen far short of that standard.

Then art. 150 limits the liability of directors except in cases of their own wilful neglect or default. Wilful default was defined by Bowen L.J. in *In re Young and Harston's Contract* (6); it means, not that a man deliberately refrains from doing anything, but that, being a free agent and knowing what he is doing, he does not do something. It excludes, we submit, such a case as this. The strongest case against the liquidator's contentions is to be found in dicta in *In re National Bank of Wales* (7), which went to the House of Lords sub nomine *Dovey* v. *Cory* (8), and the result of which appears to be that where a director does not go into matters of detail but

(1) (1822) 5 B. & Al. 837.
(2) (1742) 2 Atk. 400.
(3) L. R. 8 Eq. 381.
(4) (1887) 36 Ch. D. 787.
(5) [1895] 2 Ch. 673, 684.
(6) (1885) 31 Ch. D. 168, 174.
(7) [1899] 2 Ch. 629.
(8) [1901] A. C. 477.

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delegates details to his subordinates, and they defraud, then he cannot be held liable. Neville J. also in *In re Brazilian Rubber Plantations and Estates, Ld.*(1), stated certain principles relative to a director's duty which, we submit, were merely dicta. The judgments in *Lewis* v. *Great Western Ry. Co.*(2) do not help in determining whether there is any difference between negligence and wilful negligence.

Maugham K.C. and *Lionel Cohen* for the respondent the Earl of March. On behalf of the respondent directors, we seek to establish five propositions with regard to the liability of directors :—

(1.) Directors are bound to act honestly : *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (3); *In re National Bank of Wales* (4) ; affirmed in the House of Lords sub nom. *Dovey* v. *Cory* (5), *Prefontaine* v. *Grenier.*(6)

(2.) Directors, subject to certain qualifications hereinafter mentioned, are bound to use fair and reasonable care and diligence in the discharge of their duties, and subject to any special article absolving them, will be liable as for negligence if they substantially fail in this respect. That is in the nature of an admission, but is subject to certain qualifications which appear in the following propositions: *In re Cardiff Savings Bank* (7) ; *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (3) ; *In re National Bank of Wales* (4) ; *Dovey* v. *Cory.* (5)

(3.) Directors' duties, however, are of a somewhat special kind. Their attention to the company's affairs is only of an intermittent nature, namely at periodical board meetings. They are not bound to attend except at board meetings, nor are they bound to attend all board meetings. They are not bound to inquire into matters which are not brought before the board, unless, indeed, they are put upon inquiry by facts being brought to their attention which call for explanation ; in other words, directors are not managers and do not contract to manage the affairs of the company : *Overend and*

(1) [1911] 1 Ch. 425.
(2) 3 Q. B. D. 195.
(3) [1899] 2 Ch. 392.
(4) [1899] 2 Ch. 629.
(5) [1901] A. C. 477.
(6) [1907] A. C. 101.
(7) [1892] 2 Ch. 100.

Gurney Co. v. *Gibb* (1); *In re Denham & Co.* (2); *In re Cardiff Savings Bank* (3); *In re Lands Allotment Co.* (4)

Directors who do no more than attend board meetings, act honestly at them, and abstain from probing into matters into which they are able to probe, but to which their attention has not been directed, are relieved from liability in such a case as the present: *In re National Bank of Wales* (5), affirmed in the House of Lords sub nomine *Dovey* v. *Cory* (6); *Prefontaine* v. *Grenier* (7); *Leeds Estate, Building and Investment Co.* v. *Shepherd* (8), explained by Lord Davey in *Dovey* v. *Cory*. (6)

(4.) Directors do not in any way warrant that they are skilful or competent, and they may be much the reverse without incurring liability. Accordingly, they are not liable for errors of judgment, and the care and diligence for which they contract are only such as are reasonably to be expected from them having regard to their personal capacity and experience: *Turquand* v. *Marshall* (9); *Overend & Gurney Co.* v. *Gibb* (1); *In re Denham & Co.* (2); *Lagunas Nitrate Co.* v. *Lagunas Syndicate* (10); *In re National Bank of Wales.* (5)

(5.) Directors cannot be held liable for being defrauded, and are not called upon to distrust or to guard against the possibility of fraud being committed by employees of the company, or by any of their co-directors: *Land Credit Co. of Ireland* v. *Lord Fermoy* (11); *Joint Stock Discount Co.* v. *Brown* (12), both cases dealing with the signing of cheques, but in circumstances very different from the present case, and in the former case involving a transaction ultra vires: *In re Denham & Co.* (2); *Dovey* v. *Cory* (6); *Prefontaine* v. *Grenier*. (7)

Those five propositions represent the liability of directors apart from the provisions of s. 279 of the Companies

(1) L. R. 5 H. L. 480.
(2) (1883) 25 Ch. D. 752.
(3) [1892] 2 Ch. 100.
(4) [1894] 1 Ch. 616.
(5) [1899] 2 Ch. 629.
(6) [1901] A. C. 477.
(7) [1907] A. C. 101.
(8) 36 Ch. D. 787.
(9) (1869) L. R. 4 Ch. 376.
(10) [1899] 2 Ch. 392.
(11) (1869) L. R. 8 Eq. 7; (1870) L. R. 5 Ch. 763.
(12) L. R. 8 Eq. 381.

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(Consolidation) Act, 1908, and apart from any articles of association. We submit that this respondent cannot be held liable in respect of any of the matters covered by those propositions.

Charitable Corporation v. *Sutton* (1) was the case of a charitable trust managed by persons who although called directors were in fact trustees, and is not any authority upon the duties of directors of a limited liability company.

Having regard to art. 150 it is not possible for the applicants to succeed without attacking the good faith of the directors. Except by striking the word "wilful" out of that article, this respondent cannot be held liable. "Wilful" connotes a neglect or default committed by the director of which the director is guilty, but knowing well at the moment that he is guilty of a neglect or default in regard to his duty. He knows what his duty is, and does something short of it. In *Dovey* v. *Cory* (2) there was no such article as this. Under a somewhat analogous clause, trustees of a debenture deed were held not to have committed a breach of trust wilfully: *Leeds City Brewery, Ld.* v. *Platts.* (3) *In re Young and Harston's Contract* (4) is very far from this case, which is much nearer to *In re Brazilian Rubber Plantations and Estates, Ld.* (5), where Neville J. decided that directors might well be excused under a similar article.

If we are wrong on all our contentions, then we submit that s. 279 of the Companies (Consolidation) Act, 1908, applies with especial force to this respondent, and that he ought fairly to be excused for any negligence or breach of duty.

Barrington-Ward K.C. and *H. du Parcq* for the respondent Peter Haig Thomas, adopted the preceding argument, and addressed the Court on the evidence.

Sir Walter Schwabe K.C., *G. D. Johnston* and *J. A. Reid* for the respondent director, H. R. Grenside.

Upon the true construction of art. 150 this respondent is not liable. He has not been guilty of wilful neglect or default within the meaning of those terms as explained by *Leeds City*

(1) 2 Atk. 400.
(2) [1901] A. C. 477.
(3) Post, p. 532n.
(4) 31 Ch. D. 168.
(5) [1911] 1 Ch. 425.

Brewery Ld. v. *Platts* (1); *Lewis* v. *Great Western Ry. Co.* (2); *Forder* v. *Great Western Ry. Co.* (3); *In re Young and Harston's Contract.* (4)

In the matter of the cheques drawn to Ellis & Co., the members of the finance committee and the directors were entitled to rely upon the officials of the company to carry out their directions: *In re National Bank of Wales* (5); *Dovey* v. *Cory* (6); and there was nothing ultra vires in handing moneys to the company's brokers for investment in securities.

The cheques to Mansell were signed at well regulated intervals, and by different directors, and the evidence shows that they did not know that Mansell was being overpaid. The ultimate agreement with Mansell was obtained by the trickery of Bevan, and by suppressing information which he ought to have disclosed.

Directors who pay dividends, as the respondents did, under an honest and reasonable belief in a state of facts which would justify the payments, are not liable to replace those funds if it turns out that in fact the payments were ultra vires: *In re Kingston Cotton Mill Co.* (*No.* 2) (7); *In re National Bank of Wales.* (5)

We submit that this respondent has not been guilty of culpable or gross negligence, nor of wilful default.

Gover K.C. and *H. J. Wallington* for the respondent Lord Ribblesdale referred to *In re Denham & Co.* (8); *Leeds City Brewery, Ld.* v. *Platts* (1); *In re Young and Harston's Contract* (4); *In re Mayor of London and Tubbs' Contract* (9); *Elliott* v. *Turner* (10); *In re Johnson* (11); *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (12); *Leeds Estate, Building and Investment Co.* v. *Shepherd.* (13)

Sir John Simon K.C., Sir Malcolm Macnaghten K.C. and

(1) Post, p. 532n.
(2) 3 Q. B. D. 195.
(3) [1905] 2 K. B. 532.
(4) 31 Ch. D. 168.
(5) [1899] 2 Ch. 629.
(6) [1901] A. C. 477, 484, 492.
(7) [1896] 1 Ch. 331, 347.
(8) 25 Ch. D. 752, 767, 768.
(9) [1894] 2 Ch. 524.
(10) (1843) 13 Sim. 477.
(11) [1886] W. N. 72.
(12) (1889) 44 Ch. D. 412, 453.
(13) 36 Ch. D. 787, 798.

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R. J. T. Gibson for the respondent Sir Douglas Dawson; and *Wilfrid Greene K.C.* and *W. P. Spens* for the respondent Milligan, adopted the previous arguments, and addressed the Court on the evidence on behalf of these respective respondent directors.

Stuart Bevan K.C. and *George Phillips* for the respondent auditors. We desire to reserve the point that the auditors are not officers of the company within the meaning of s. 215 of the Companies (Consolidation) Act, 1908. It is not open to us to argue that question here, inasmuch as in *In re London and General Bank* (1) it was held by the Court of Appeal that an auditor was an officer within the meaning of the corresponding section in the earlier Act, but in the later case of *In re Kingston Cotton Mill Co.* (2) Lord Herschell expressed no opinion upon the question whether the earlier case was rightly decided but left that question open, although the Court of Appeal in the later case (3) felt themselves bound by the decision in *In re London and General Bank.* (1)

The evidence shows that Mr. Lepine displayed extraordinary care and accuracy in his work and figures. He fully maintained the standard of duty which, apart from agreement, he had to the company—namely, to exhibit the care and skill which an accountant of standing should exercise, but that is not the only standard to be considered, for, by virtue of art. 150, he can only be liable if any neglect or default on his part was of the wilful character dealt with by Lord Sterndale M.R. and Warrington L.J. in *Leeds City Brewery Ld.* v. *Platts.* (4) There has, we submit, been no wilful neglect or default on the part of Mr. Lepine. With regard to the Treasury Bills, there was nothing in the books to show that there was any window dressing. He obtained verification certificates of the existence of the securities, and we submit that he was not negligent because he did not inspect them, relying, in common with other people of standing in the City of London, upon the word of Ellis & Co. There is no rigid rule with regard to the inspection of documents,

(1) [1895] 2 Ch. 166.
(2) [1896] 1 Ch. 6, 16.
(3) [1896] 2 Ch. 279.
(4) Post, p. 532n.

and it is purely a matter for the discretion of the auditor in each particular case. If Mr. Lepine had pressed to inspect the securities it is inconceivable in the circumstances that Bevan would not have managed to produce them.

The auditors had no duty to disclose in the balance sheets the names of Ellis & Co. or of Mansell as debtors. The reports of the auditors drew attention to these debts, but those reports were suppressed by Bevan and never reached the directors. Further it was no part of the auditors' duty to consider the agreement with Mansell, authorized as it was by the directors. These debts were rightly called "loans at call or short notice"; they were payable on demand, loans terminable within a short period or short loans; *De Peyer* v. *The King*. (1) Moneys in the hands of Ellis & Co. were moneys held by them as agents for the company and were rightly described as "cash at bank or in hand"; they did not include debts, properly so called, from Ellis & Co. The principles relating to an auditor's duty are clearly laid down in *In re London and General Bank* (*No.* 2) (2) and in *In re Kingston Cotton Mill Co.* (*No.* 2) (3) and are applicable to the present case, and if applied to the facts of this case, absolve the respondent auditors from all liability.

Topham K.C. in reply. This is a case in which one unscrupulous person took advantage of the opportunities for fraud which were quite innocently provided by his too trusting colleagues on the board, who misapprehended their duties. They deliberately and intentionally did certain things and omitted certain things, and left things to others, not realizing in most, if not all, cases that it was their duty to look after those things themselves. They allowed vast sums to remain in the hands of Ellis & Co. without any control of any kind with a consequent heavy loss to the company. If directors do not take as much care in looking after the funds of the company as a reasonable and prudent man would in like circumstances take in his own affairs, they are liable for the consequences. If that is the true

(1) (1909) 100 L. T. 256. (2) [1895] 2 Ch. 673.
(3) [1896] 2 Ch. 279.

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standard, then for the purposes of this case s. 279 of the Companies (Consolidation) Act, 1908, does not carry the matter any further: *Lewis* v. *Great Western Ry. Co.* (1); *Forder* v. *Great Western Ry. Co.* (2); and *Leeds City Brewery, Ld.* v. *Platts* (3), are not relevant to the consideration of art. 150, the latter part of which is really a reproduction of s. 24 of the Trustee Act, 1893, which repeated s. 31 of Lord St. Leonard's Act, and those sections only stated the existing law relative to trustees: *In re Brier* (4); *Dix* v. *Burford* (5); *Mucklow* v. *Fuller.* (6) The rights given by s. 215 of the Companies (Consolidation) Act, 1908, are independent of and cannot be modified by any such provisions as those of art. 150, and I submit that in this respect *In re Brazilian Rubber Plantations and Estates, Ld.* (7) was wrongly decided.

Cur. adv. vult.

May 22. ROMER J. On June 27, 1916, Gerrard Lee Bevan became a director of the City Equitable Fire Insurance Company, Ld. The company at that time was carrying on successfully the business of reinsurance of fire and marine risks, and was in a sound financial condition. On February 14, 1922, an order was made for the winding up of the company by the Court. A searching investigation of the affairs of the company was then made, and this investigation disclosed a shortage in the funds of which the company should have been possessed of over 1,200,000*l.* This deplorable state of affairs was in no way due to the company's trading operations as a reinsurance company. From the year 1916 onwards to February 28, 1921, which is the date of the company's last published balance sheet, there was a steady and most remarkable increase in the premium income of the company, due principally to the fact that it had been able to secure a large part of the business of the Munich Reinsurance Company, who, before the outbreak of war, had done most

(1) 3 Q. B. D. 195.
(2) [1905] 2 K. B. 532.
(3) Post, p. 532n.
(4) (1884) 26 Ch. D. 238.
(5) (1854) 19 Beav. 409.
(6) (1821) Jac. 198.
(7) [1911] 1 Ch. 425.

of the reinsurance business in this country. For the year ending February, 1916, the company's premium income from all classes of insurance was 363,000*l.* For the year ending February, 1919, the premium income on fire and general account was 613,483*l.*, and on marine account was 1,351,000*l.* For the year ending February, 1920, the corresponding figures were 1,189,759*l.* and 1,422,471*l.*, and for the year ending February, 1921, they were 2,071,515*l.* and 1,469,197*l.* In each of the years 1919, 1920 and 1921 there was a large and progressive trading profit. The collapse of the company was not, therefore, due to its reinsurance business. It was entirely due to the following causes. Various industrial investments of the company, of which the net cost to the company had been 701,739*l.*, have realized or are estimated to realize 202,373*l.*, representing a loss of close upon 500,000*l.* Over 445,000*l.* of the company's funds had been applied in acquiring an interest in certain lands in Brazil, and this interest is estimated at the present time to be worth about 100,000*l.* only. No less a sum than 110,000*l.* had found its way into the hands of the company's manager in circumstances to be detailed hereafter, and none of that money is recoverable. A sum of 385,000*l.* odd was due from Ellis & Co., the company's brokers, of which firm Bevan was the senior partner, and against this indebtedness the company held collateral security that has realized under 31,000*l.* In respect of the balance it is estimated that only about 14,000*l.* will ultimately be received as dividend in the bankruptcy of that firm. Bevan himself had misappropriated other moneys of the company amounting to nearly 7000*l.*, and some 9000*l.* had been lent by Bevan or Ellis & Co. to a company known as the Saskatoon Grain Company without any authority whatever. Little, if anything, will ever be recovered in respect of these two sums. Nearly the whole of these enormous losses were brought about through Bevan's instrumentality, and a large part of them by his deliberate fraud. For that fraud he has been tried, and convicted, and is now suffering the just penalty. But the question not unnaturally arises as to whether, during the period

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covered by Bevan's nefarious activities, the other directors and the auditors of the company were properly discharging the duties that they owed to the company's shareholders. The Official Receiver, as the liquidator of the company, alleges that they were not. He has accordingly included them, or such of them as are still living, as respondents to the summons which he issued against Bevan under s. 215 of the Companies Act; and whilst admitting, and rightly admitting, that they have acted honestly throughout, he claims that they have been guilty of such negligence as to render themselves liable to the company in damages. Whether they are, or are not so liable, is the question that I have to determine. It will be convenient to consider the case of the directors and the case of the auditors separately, and I propose to begin with the directors. But before investigating the facts it will be convenient to consider the law applicable to the case.

It has sometimes been said that directors are trustees. If this means no more than that directors in the performance of their duties stand in a fiduciary relationship to the company, the statement is true enough. But if the statement is meant to be an indication by way of analogy of what those duties are, it appears to me to be wholly misleading. I can see but little resemblance between the duties of a director and the duties of a trustee of a will or of a marriage settlement. It is indeed impossible to describe the duty of directors in general terms, whether by way of analogy or otherwise. The position of a director of a company carrying on a small retail business is very different from that of a director of a railway company. The duties of a bank director may differ widely from those of an insurance director, and the duties of a director of one insurance company may differ from those of a director of another. In one company, for instance, matters may normally be attended to by the manager or other members of the staff that in another company are attended to by the directors themselves. The larger the business carried on by the company the more numerous, and the more important, the matters that must of necessity

be left to the managers, the accountants and the rest of the staff. The manner in which the work of the company is to be distributed between the board of directors and the staff is in truth a business matter to be decided on business lines. To use the words of Lord Macnaghten in *Dovey* v. *Cory* (1): "I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more."

In order, therefore, to ascertain the duties that a person appointed to the board of an established company undertakes to perform, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officials of the company, provided always that this distribution is a reasonable one in the circumstances, and is not inconsistent with any express provisions of the articles of association. In discharging the duties of his position thus ascertained a director must, of course, act honestly; but he must also exercise some degree of both skill and diligence. To the question of what is the particular degree of skill and diligence required of him, the authorities do not, I think, give any very clear answer. It has been laid down that so long as a director acts honestly he cannot be made responsible in damages unless guilty of gross or culpable negligence in a business sense. But as pointed out by Neville J. in *In re Brazilian Rubber Plantations and Estates, Ld.* (2), one cannot say whether a man has been guilty of negligence, gross or otherwise, unless one can determine what is the extent of the duty which he is alleged to have neglected. For myself, I confess to feeling some difficulty in understanding the difference between negligence and gross negligence, except in so far as the expressions are used for

(1) [1901] A. C. 477, 488. (2) [1911] 1 Ch. 425, 437.

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the purpose of drawing a distinction between the duty that is owed in one case and the duty that is owed in another. If two men owe the same duty to a third person, and neglect to perform that duty, they are both guilty of negligence, and it is not altogether easy to understand how one can be guilty of gross negligence and the other of negligence only. But if it be said that of two men one is only liable to a third person for gross negligence, and the other is liable for mere negligence, this, I think, means no more than that the duties of the two men are different. The one owes a duty to take a greater degree of care than does the other: see the observations of Willes J. in *Grill* v. *General Iron Screw Collier Co.* (1) If, therefore, a director is only liable for gross or culpable negligence, this means that he does not owe a duty to his company, to take all possible care. It is some degree of care less than that. The care that he is bound to take has been described by Neville J. in the case referred to above as "reasonable care" to be measured by the care an ordinary man might be expected to take in the circumstances on his own behalf. In saying this Neville J. was only following what was laid down in *Overend & Gurney Co.* v. *Gibb* (2) as being the proper test to apply, namely: "Whether or not the directors exceeded the powers entrusted to them, or whether if they did not so exceed their powers they were cognisant of circumstances of such a character, so plain, so manifest, and so simple of appreciation, that no men with any ordinary degree of prudence, acting on their own behalf, would have entered into such a transaction as they entered into?"

There are, in addition, one or two other general propositions that seem to be warranted by the reported cases: (1.) A director need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. A director of a life insurance company, for instance, does not guarantee that he has the skill of an actuary or of a physician. In the words of Lindley M.R.: "If directors act within their powers,

(1) (1866) L. R. 1 C. P. 600, 612. (2) L. R. 5 H. L. 480, 486.

if they act with such care as is reasonably to be expected from them, having regard to their knowledge and experience, and if they act honestly for the benefit of the company they represent, they discharge both their equitable as well as their legal duty to the company" : see *Lagunas Nitrate Co.* v. *Lagunas Syndicate.* (1) It is perhaps only another way of stating the same proposition to say that directors are not liable for mere errors of judgment. (2.) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodical board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however, bound to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so. (3.) In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly. In the judgment of the Court of Appeal in *In re National Bank of Wales, Ld.* (2), the following passage occurs in relation to a director who had been deceived by the manager, and managing director, as to matters within their own particular sphere of activity : " Was it his duty to test the accuracy or completeness of what he was told by the general manager and the managing director ? This is a question on which opinions may differ, but we are not prepared to say that he failed in his legal duty. Business cannot be carried on upon principles of distrust. Men in responsible positions must be trusted by those above them, as well as by those below them, until there is reason to distrust them. We agree that care and prudence do not involve distrust ; but for a director acting honestly himself to be held legally liable for negligence, in trusting the officers under him not to conceal from him what they ought to report to him, appears to us to be laying too heavy a burden on honest business men." That case went to the House of Lords, and is reported there under

(1) [1899] 2 Ch. 392, 435. (2) [1899] 2 Ch. 629, 673.

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the name of *Dovey* v. *Cory*. (1) Lord Davey, in the course of his speech to the House, made the following observations: (2) "I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information and advice, of the chairman and general manager, as to whose integrity, skill and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *Hallmark's Case* (3), and by Chitty J. in *In re Denham & Co.* (4), that directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference."

These are the general principles that I shall endeavour to apply in considering the question whether the directors of this company have been guilty of negligence. But in order to determine whether any such negligence, if established, renders the directors liable in damages, it is necessary to consider the provisions of art. 150 of the company's articles of association. That article is in these terms. [His Lordship read the article and continued:] The earlier part of this article appears to be concerned with actions and claims against the directors brought or made by persons other than the company itself. The importance of the article for the present purpose is to be found in the later part, which provides that the directors are not to be answerable for insufficiency or deficiency of any security or for any other loss, misfortune, or damage which may happen in the execution of their respective offices or trusts or in relation thereto "unless the same shall happen by or through their own wilful neglect or default

(1) [1901] A. C. 477.
(2) Ibid. 492.
(3) (1878) 9 Ch. D. 329.
(4) 25 Ch. D. 752.

respectively." In opening the case for the liquidator, Mr. Topham treated this article as in no way modifying the general law relating to directors. He contented himself with citing a passage from the judgment of Bowen L.J. in *In re Young and Harston's Contract.* (1) That was a case in which the Court of Appeal had to consider whether a vendor of real estate had been guilty of wilful default within the meaning of a condition of sale which imposed upon the purchaser a liability to pay interest on his purchase money from the date fixed for completion until actual payment if the completion were delayed from any cause whatever other than wilful default on the part of the vendor. Bowen L.J. expressed himself as follows: "Default is a purely relative term, just like negligence. It means nothing more, nothing less, than not doing what is reasonable under the circumstances—not doing something which you ought to do, having regard to the relations which you occupy towards the other persons interested in the transaction. The other word which it is sought to define is 'wilful.' That is a word of familiar use in every branch of law, and although in some branches of the law it may have a special meaning, it generally, as used in Courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." If these words of Bowen L.J. be read without reference to the facts of the case in which they were used, I should agree that the word "wilful" in art. 150 was superfluous, and qualifies in no way a director's liability for negligence. For a director acting under compulsion, or at a time when his mind was no longer functioning, could hardly be said to be guilty of negligence or default—words that by themselves surely connote free agency and spontaneous action of the will. It is, however, to be observed that in *In re Young and Harston's Contract* (2) the vendor left this country on

(1) 31 Ch. D. 168, 174. (2) 31 Ch. D. 168.

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the very day on which the sale should have been completed without even leaving an address to which the conveyance could be sent to him for execution. Sir James Hannen says this (1): "The cardinal point in the case appears to be this, whether where a person has entered into a contract to be completed upon a particular day—in this case the 8th September—and he, knowing that, goes away upon the 6th to take his autumn holiday, he has been guilty of wilful default thereby causing the non-completion of the contract. It seems to me a very plain case, and I really can entertain no doubt whatever as to what any jury would have thought, and we, in the position of the jury, come to the conclusion that he made default in not being in the position to complete the contract so far as it lay with him upon the 8th of September; and that was default of an intentional character on his part, and therefore wilful." Then a little lower down: "Our judgment, therefore, is that where a man knowing that some act has to be done by him on the particular day, goes away in disregard of that obligation, he is guilty of default; and doing it intentionally, it is wilful within the terms of a contract of this kind." It was a case, therefore, where the vendor's default consisted not merely of an omission to do an act which it was his duty to do, but of an omission to do an act which he knew it was his duty to do. This is the view of the case that was taken in the later decision of the Court of Appeal in *In re Mayor of London and Tubbs' Contract.* (2) That also was a case arising under a contract between vendor and purchaser of real estate, and again the Court had to consider whether the vendor had been guilty of wilful default within the meaning of a condition similar to that in the earlier case. The default of the vendor consisted of an innocent misstatement as to his title contained in the contract. Lindley L.J. in his judgment said (3): "I am aware that in *Elliott* v. *Turner* (4) Vice-Chancellor Shadwell expressed the opinion that forgetfulness might amount to wilful default. The case before him was, however, of a very different kind

(1) 31 Ch. D. 173.
(2) [1894] 2 Ch. 524.
(3) [1894] 2 Ch. 536.
(4) 13 Sim. 477.

from the present. I confess that I am more disposed to concur with Lord Bramwell's observations on the term 'wilful misconduct' in *Lewis* v. *Great Western Ry. Co.* (1) They are, in my opinion, quite consistent with Lord Bowen's observations in *In re Young and Harston's Contract* (2), if it be borne in mind that Lord Bowen presupposed knowledge of what was done, and intention to do it, and was not addressing himself to a case of an honest mistake or oversight. No doubt the statements contained in the 4th condition were deliberate, and to that extent 'wilful'; but the misstatement was not 'wilful.'" Lopes L.J. said (3), in speaking of the judgment of Bowen L.J. in *In re Young and Harston's Contract* (2): "I do not think the learned judge was contemplating an honest oversight. He was dealing with a different case, where, two days before the time fixed for completion, the vendor left England without having executed the conveyance which was ready for his execution in the afternoon of the day fixed." Then, after quoting a passage from the judgment of Sir James Hannen, cited above, he added: "What the vendor did there was not regarded as a mistake, much less an honest or unintentional oversight. That case, in my judgment, is distinguishable from the present, and expressions applicable to that case are inapplicable here. In *Lewis* v. *Great Western Ry. Co.* (1) Lord Justice Bramwell says—defining 'wilful' in connection with misconduct—"wilful misconduct" means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful.' This, to my mind, is a more accurate definition of 'wilful' than that given by Vice-Chancellor Shadwell in *Elliott* v. *Turner* (4), where he says, 'In my opinion the word "wilful" can have no other meaning than "spontaneous": and, if the neglect or default in this case arose from the voluntary act of the parties, either awake or asleep with reference to their rights and interests, and did not at all arise from the pressure of external circumstances over which they could have no control,

(1) 3 Q. B. D. 195, 206.
(2) 31 Ch. D. 168.
(3) [1894] 2 Ch. 538.
(4) 13 Sim. 485.

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I apprehend that the neglect or default was wilful.' It is difficult to lay down any general definition of 'wilful.' The word is relative, and each case must depend on its own particular circumstances."

If I may say so with respect, the difficulty is not so much in ascertaining the meaning of the adjective "wilful," as in ascertaining precisely what is the noun to which the adjective is to be applied. An act, or an omission to do an act, is wilful where the person of whom we are speaking knows what he is doing and intends to do what he is doing. But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing, and intends to commit, a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty. This conclusion appears to me to be warranted by at least three authorities, one of which was referred to in the passage quoted above from the judgment of Lopes L.J. In *Lewis* v. *Great Western Ry. Co.* (1) the question arose as to the meaning of the phrase "wilful misconduct" in a contract for the carriage by the defendant company of goods of the plaintiff. The goods had admittedly been damaged owing to the conduct of the defendants' servants. Under the terms of the contract, however, the defendants were not liable unless the damage was occasioned by the wilful misconduct of their servants. Bramwell L.J. said (1): "Was this damage caused by the wilful misconduct of the defendants' servants? Mr. Powell's argument, when analysed, is to this effect: 'The conduct of which we complain was their conduct, and that conduct was misconduct, and it was not accidental, therefore it was wilful.' So that, in the result, unless a thing is a pure accident, it is wilful. If a man were walking along and tripped over some goods which he did not happen to see, it would be said that the tripping was the result of his conduct, which was *mis*conduct—not accidental but wilful—and that the

(1) 3 Q. B. D. 195, 206.

wilfulness was in not looking out. I do not, however, think that the question can be thus dealt with. There is such a mass of authorities to show what 'wilful misconduct' is, that we should hardly be justified, as a Court of Appeal, in departing from them, even if we thought them to be wrong. 'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct, must be wilful." Brett L.J. said (1): "In a contract where the term wilful misconduct is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do; and also, as my Lord has put it, if it is brought to his notice that what he is doing or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct; or if he does, or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission." Cotton L.J. delivered judgment to the same effect. Both Brett L.J. in the passage I have just read, and Cotton L.J. in his judgment, draw, no doubt, a distinction between wilful misconduct and negligence of every kind. But I cannot

(1) 3 Q.B.D. 210.

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assent to the argument of Mr. Topham that these judgments afford no assistance in determining whether or not there be any difference between negligence and wilful negligence. The case seems to me to be an authority for the proposition that a wilful act, which act amounts to negligence, is not wilful negligence unless there be a will to be negligent.

In *Forder* v. *Great Western Ry. Co.* (1), the question of the meaning of wilful misconduct again came up for consideration before a Divisional Court. Lord Alverstone C.J. in giving judgment said (2): "I am quite prepared to adopt, with one slight addition, the definition of wilful misconduct given by Johnson J. in *Graham* v. *Belfast and Northern Counties Ry. Co.* (3), where he says: 'Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences.' The addition which I would suggest is, 'or acts with reckless carelessness, not caring what the results of his carelessness may be.'"

The third of the authorities to which I have referred is a recent decision of the Court of Appeal in *Leeds City Brewery, Ld.* v. *Platts.* (4) The case does not appear to be reported (4), but I have been furnished with a transcript of the judgments of the members of the Court, consisting of Lord Sterndale M.R. and Warrington and Younger L.JJ. The question that had to be decided was as to the liability of a trustee of a debenture trust deed for the loss occasioned by an investment that had been made by him. The investment was an unauthorized one, and, in making it, the trustee was admittedly guilty of a breach of trust. It was, however,

(1) [1905] 2 K. B. 532.
(2) Ibid. 535.
(3) [1901] 2 I. R. 13.
(4) Now reported post, p. 532n.

held by the Court of Appeal that the trustee was absolved from liability by virtue of two clauses in the trust deed. Those two clauses when read together went a good deal further than the 150th article of association of the City Equitable Fire Insurance Company, and the actual decision has little, if any, bearing upon the question of the liability of the respondents in the present case. But both Lord Sterndale and Warrington L.J. in delivering judgment made certain observations that are of general application. By one of the clauses it was provided that the trustees of the deed and each of them should be kept indemnified from and against all actions, proceedings, costs, charges, claims and demands whatsoever that might arise or be brought or made against them or him in respect of any matter or thing done or omitted without their or his own wilful default. In referring to this clause, Lord Sterndale said: "With regard to those words about their or his own wilful default, I think Mr. Maugham is right in saying that they are not used in the technical way when you are speaking of taking an account on the basis of wilful default, but I think they are used as meaning—unless they have failed to do their duty purposely and wilfully, unless there is some wilful misconduct." Then, after stating that the other clause relied upon by the trustee was not meant to protect him against a wilful doing wrong, he added: "Therefore the question to my mind which has to be decided to settle this appeal is whether Mr. Beevers was to be held to have done this wilfully and intentionally knowing that what he was doing was wrong. The learned judge has found that he did. It was wilful neglect, as he calls it, which I take to mean wilfully doing what was wrong, and wilfully doing what he knew it was his duty not to do, or not doing what he knew it was his duty to do." Warrington L.J., after referring to one of the clauses in question, said: "The learned judge, and here I agree with his view, has held that assuming that the trustee was guilty of wilful breach of trust, he would not be protected by that clause. I am inclined to agree with him there. But then it becomes important to consider what is meant by a wilful breach of trust, or wilful

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negligence or wilful failure to perform his duty. I think it means this. I think it means deliberately and purposely doing something which he knows, when he does it, is a breach of trust, consisting in a failure to perform his duty as trustee."

Mr. Topham, in his reply, urged that these authorities were not relevant to the consideration of art. 150. The later part of that article, he said, was substantially a reproduction of s. 24 of the Trustee Act, 1893, which in turn was a repetition of s. 31 of Lord St. Leonard's Act, and he contended that these sections had always been regarded as doing little more than stating the existing law in relation to trustees. In support of this contention he cited *In re Brier* (1); *Dix* v. *Burford* (2); and *Mucklow* v. *Fuller*. (3) In *In re Brier* (1) the question to be decided was whether or not certain trustees should be charged with a sum of money collected by their agent, which sum had been lost, owing to the agent's subsequent insolvency. The passage in Lord Selborne's judgment relied upon by Mr. Topham is as follows: "I think that in this case the burden of proof is upon the respondents who seek to charge the executors with this money. The statute 22 & 23 Vict. c. 35, s. 31, provides, in effect, that trustees shall not be responsible for any banker, broker, or other person with whom trust moneys have been deposited (which I understand to mean properly deposited) unless it can be shown that that loss happened through their own wilful fault. The statute incorporated, generally, into instruments creating trusts the common indemnity clause which was usually inserted in such instruments. It does not substantially alter the law as it was administered by Courts of equity, but gives it the authority and force of statute law, and appears to me to throw the onus probandi on those who seek to charge an executor or trustee with a loss arising from the default of an agent, when the propriety of employing an agent has been established. In the present case, the learned judge in the Court below has virtually decided that this was a case of proper employment of an agent for a proper purpose,

(1) 26 Ch. D. 238, 243, 244. (2) 19 Beav. 409.
(3) Jac. 198.

and, as far as I can judge, the nature of the case justifies that view." But when the whole of the judgment is read, it is, I think, reasonably clear that Lord Selborne, when referring to the law as it was administered by Courts of equity, was referring to the law as to the employment of agents by trustees. He had not to consider, and he expressed no opinion as to, the meaning of the expression "wilful default." This sufficiently appears from a later part of his judgment, which is in these words: "Then if a person seeks to charge the executors with a loss arising from the default of an agent whom it is admitted to have been reasonable to employ, does it not lie on him to inform the Court of the circumstances under which the loss arose, the time during which the money was in the agent's hands, the time at which the insolvency took place? This having been done, the executors, on the other hand, would have an opportunity of shewing what efforts they had made and what means they had used for getting in the money and what, if any, were the difficulties in their way. Now, it appears to me here, that the person on whom the onus probandi lies has failed to inform the Court of the circumstances which it was absolutely necessary for the Court to know, before it could come to the conclusion that the loss by the agent's insolvency was due to some wilful default on the part of the executors."

In *Dix* v. *Burford* (1) a trustee was held liable for the loss occasioned by reason of his omission to procure himself to be admitted tenant to certain copyholds upon the security of which the trust fund of 400*l.* was invested. In consequence of this omission his co-trustee had been enabled to obtain possession of the trust fund and convert it to his own use. The will creating the trust contained a direction that the trustees should not be chargeable, but only for their respective receipts, payments, acts and wilful defaults and not otherwise, nor with any sum or sums of money other than such as should come to their or his own hands respectively by virtue of the will, nor with any loss or damage which might happen to the said sum of 400*l.* in consequence of its remaining on security

(1) 19 Beav. 409, 413.

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as therein directed, unless the same should happen by or through his or their respective wilful default. Sir John Romilly, in holding the trustee liable, said: "I think Yells is not exonerated by the indemnity clause. All the testator has said is, that if by remaining on the security any loss or damage should arise, the trustees shall not be liable, unless it should happen by their default. Thus, if the estate had become of less value, or the mortgagor had become unable to pay, the trustees were to incur no liability. The ordinary trustee indemnity clause affords no security to a trustee who neglects to take the steps necessary to secure the fund." The decision therefore was that the trustee was not exonerated by the particular indemnity clause in that case. The construction which Sir John Romilly put upon the clause did not necessitate a determination of the meaning of the words "wilful default." He did no doubt make a general observation as to the ordinary trustee indemnity clause, but it would, I think, be wrong to infer from what he said that he considered every trustee who neglected to secure the trust fund to be necessarily guilty of "wilful default."

In *Mucklow* v. *Fuller* (1) a testatrix by her will, reciting that one Mucklow was indebted to her in a sum of 500*l.*, directed her executors and trustees to get in and place the 500*l.* on Government stock or security at interest within three years after her decease and appointed Mucklow and the defendant Fuller to be her executors. The 500*l.* was never got in or invested, as directed by the will, and was ultimately lost owing to Mucklow's insolvency. The question to be decided was whether Fuller was liable for the loss. The will contained a clause declaring that Mucklow and Fuller were to be chargeable with or accountable for such moneys only as they should actually receive, and not to be answerable or accountable for each other, but each for his own acts, receipts, payments, neglects, or defaults only, and not for any moneys for which they should join in any transfer or sign any receipt for conformity; and they were not to be answerable for any banker with whom they might deposit

(1) Jac. 198, 201.

the trust moneys, or for any other loss, unless it should happen through their wilful default. It seems that Fuller, although he had proved the will, had, except for two small transactions, entirely neglected his duties. Lord Eldon, in holding him to be liable, said, in reference to the indemnity clause, " I cannot but think it most dangerous to lay it down, that with such a clause as this, he can prove the will, and then say that some one else may perform the trusts." Lord Eldon had treated the defendant as acting bona fide and as holding the opinion that he had nothing to do with the trusts. But I do not think that Lord Eldon was in any way considering what was the meaning of the expression " wilful default " as applied to a person acting in a trust. His decision appears to have merely been that the ordinary indemnity clause has no application at all to a man who neglects the trust altogether. It only applies to an acting trustee; it never begins to apply to one who does not act at all.

There is not, so far as I know, an authority in which the meaning of " wilful default " in the ordinary trustee indemnity clause has been determined or even considered. I am therefore at liberty to place upon art. 150 the construction which appears to me to be warranted by the authorities in which the meaning of " wilful default," " wilful neglect " and " wilful misconduct " has been determined in other connections. Before leaving this article, however, there is another matter to which I ought to refer. In the case of *In re Brazilian Rubber Plantations and Estates, Ld.* (1), to which reference has already been made, it was sought to make directors liable for negligence. The articles of association contained a clause exonerating a director from liability for loss or damage unless the same happened through his own dishonesty. Neville J. acquitted the directors of negligence, but he also held that this clause in the articles of association was also a fatal objection to the application of the liquidator which was made, as is the present application, under s. 215 of the Companies (Consolidation) Act, 1908. Referring to the clause in question he said: " I do not see how to escape

(1) [1911] 1 Ch. 425, 440.

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from the conclusion that this immunity was one of the terms upon which the directors held office in this company. I do not think that it is illegal for a company to engage its directors upon such terms. I do not think, therefore, that an action by this company against its directors for negligence, where no dishonesty was alleged, could have succeeded. It appears to me that an application under s. 215 of the Companies (Consolidation) Act, 1908, stands on the same footing." He then referred to certain observations of Lord Macnaghten and Lord Herschell in *Cavendish Bentinck* v. *Fenn* (1) as warranting this conclusion. Mr. Topham did not feel justified in asking me to decline to follow this decision, but he reserved to himself the right to question it in the Court of Appeal, and to ask that Court to hold that the rights given by s. 215 of the Act are independent of and cannot be modified by any provision contained in the articles of association. In these circumstances I propose to follow the decision of Neville J. upon this point without expressing any opinion of my own.

I must now turn to the facts of the case for the purpose of ascertaining first, whether in any of the matters charged against them the respondents have been guilty of negligence, and secondly, whether any such negligence was wilful, negligence and default meaning for all practical purposes one and the same thing. That Bevan was guilty not merely of wilful negligence but also of fraud will appear quite clearly. The real question that I have to decide is with reference to his co-directors. These co-directors are Mr. Peter Haig Thomas, Mr. Henry Ralph Grenside, the Earl of March, Lord Ribblesdale, Sir Douglas Dawson, Mr. David Macbeth Moir Milligan, and Sir Henry Grayson. Of these gentlemen Mr. Grenside became a director on March 31, 1915, Lord March, Lord Ribblesdale, and Sir Douglas Dawson on April 21, 1915, Mr. Haig Thomas on June 27, 1916, Mr. Milligan on August 27, 1916, and Sir Henry Grayson on December 4, 1917. They all continued to be directors down to the date of the liquidation of the company, with the exception of Lord March, who retired

(1) (1887) 12 App. Cas. 652, 669.

from the board on January 3, 1922. A Mr. C. T. Barclay was also a director of the board during part of Bevan's directorship, but he resigned on October 5, 1920, and died soon afterwards, and his position need not be further considered except in so far as it affected his co-directors. All the others that I have mentioned were made respondents to the summons. By arrangement between the Official Receiver and Sir Henry Grayson, however, all further proceedings against him have been stayed. I am accordingly relieved of the task of considering any question as to his liability. In these circumstances, whenever in this judgment I refer to the respondent directors, I intend to exclude the respondents Bevan and Sir Henry Grayson, and, of course, Mr. C. T. Barclay. The Official Receiver in these proceedings sought to make the respondent directors liable for the losses occasioned to the company by (1.) Investing or permitting to be invested moneys of the company amounting to 701,739*l.* in the investments set forth in para. 12 of the points of claim. (2.) Investing or permitting to be invested 445,374*l.* in a ranch in Brazil. (3.) Authorizing or permitting the manager Mansell to become indebted to the company in the sum of 110,000*l.* (4.) Lending or allowing to remain in the hands of Ellis & Co., the company's brokers, large sums of money amounting at the date of the winding up to some 350,000*l.* (5.) Making or permitting to be made a loan to Bevan of 6952*l.* (6.) Lending to a company called the Saskatoon Grain Company a sum of 9329*l.* (7.) Paying dividends in respect of the financial year ending February 28, 1921, and (8.) Paying an interim dividend in respect of the financial year ending February 28, 1922. The claims in respect of these dividends, alleged by the Official Receiver to have been paid out of capital, are, however, in the nature of alternative claims. There are one or two other matters referred to in the points of claim, in respect of which the Official Receiver sought to make the respondent directors liable, but they were abandoned by his counsel during the hearing before me and need not be mentioned further.

I propose, so far as is possible, to consider each of these

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matters separately, and in the order in which I have mentioned them; and to consider, wherever it becomes necessary to do so, the position of each of the respondent directors individually in relation to the particular matter in question. Before doing so, however, I desire to make one general observation. Cases have not been unknown in which a director has lent his name to a company for what may be called window dressing purposes, and has treated himself as having thereby given ample consideration for his remuneration and as being absolved from any further effort towards promoting the welfare of the company. This cannot be said of any one of the respondent directors. It was not possible for them all to attend to the company's affairs with equal regularity. Lord March, for instance, owing to serious illness resulting in grave physical incapacity, was unable, except for two occasions in 1918, to attend any board meetings until the summer of 1920. He offered indeed to resign his directorship in the year 1917, but he was persuaded by his colleagues to remain. Mr. Milligan, who resides and carries on business in Aberdeen, was for that reason unable to attend at meetings of the board as often as he could have wished. But I am satisfied from the evidence adduced before me that each one of the respondent directors was willing and anxious to give of his best to the company and at all times took as active a part in the work of the board as circumstances would reasonably permit.

Turning now to the claims made by the Official Receiver, I come first to that in respect of the investments mentioned in para. 12 of the points of claim. During the hearing before me, the claim of the Official Receiver under this heading was ultimately confined to two investments—namely, the investment of a sum of 228,813*l.* in shares in Claridge's Hotel, Paris, and the investment of a sum of 70,970*l.* in shares in the United Brass Founders and Engineers, Ld. In so limiting his claim, the Official Receiver in no way admitted that the remainder of the investments specified in para. 12 of the points of claim were proper investments for the funds of an insurance company. It was, however, reasonably clear that

if he could not succeed in respect of the two particular investments mentioned he was not likely to succeed in respect of the remainder; while if he did succeed in respect of these two investments and the other matters included in the other heads of claim to which reference has been made, the combined wealth of the respondent directors would not be sufficient to make good the losses that had been thereby occasioned to the company.

Before considering the circumstances of the two investments thus selected by the Official Receiver for attack, it is necessary to refer to the setting up of the finance committee of the board. This was done by a resolution passed at a board meeting held on July 25, 1916, at which Bevan, Haig Thomas, Lord Ribblesdale, Grenside and Sir Douglas Dawson were present. The minute recording this resolution is in these terms: "Mr. Bevan, Mr. Thomas and Mr. Grenside were appointed a finance committee with power to make or sell investments on behalf of the company not exceeding 5000*l.* in any one security." In passing this resolution the directors were exercising the power of delegation conferred upon them by art. 123 of the company's articles of association. That article is in these terms: "The directors may delegate any of their powers, other than the powers to borrow and make calls, to committees consisting of such members of their body as they think fit. Any committee formed shall in the exercise of the power so delegated conform to any regulations that may from time to time be imposed upon them by the Board." But not only was it within the powers of the directors to set up the finance committee. It was, judged in the light of what was then known to the directors, a most reasonable thing to do. Bevan, who had been elected chairman of the board on July 11, 1916, was one of the greatest authorities on finance in the City of London. In reputation and in credit he stood second to none. His advice on questions of investment was eagerly sought and readily followed. Later events have indeed proved him to be a rogue. But it is, I think, impossible to form a just estimate of the conduct of the respondent directors, not only in respect of the finance

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committee and its doings, but also in respect of all the matters with which I have to deal, unless a clear picture can be formed of Bevan as he must have appeared to his colleagues at the time. Mr. Haig Thomas was also a man of great business experience. He had, before joining the board of the City Equitable, been chairman and managing director respectively of two of the largest colliery companies in South Wales, whose combined capitals amounted to about three million pounds. Mr. Grenside for his part brought into the finance committee the legal knowledge and the more general business experience of a solicitor. In October, 1916, Mr. C. T. Barclay became an additional member of the board and of the finance committee, and remained so until he retired in October, 1920. He was the senior partner in the firm of Messrs. Sheppard, Pelley & Co., a firm of stockbrokers of the highest reputation. To a committee thus constituted the other respondent directors might well delegate the duties of investing the funds of the company. I cannot help regretting that Mr. Milligan was not added to the committee, as he had had a greater practical experience of the business of an insurance company than the remainder of the board. I feel sure that he would have prevented one or two investments made by the finance committee which, whatever else may be said of them, were not prudent investments for an insurance company to make. Mr. Milligan, however, was, as already stated, resident in Aberdeen.

It will have been observed that, according to the minute recording the appointment of the finance committee, their powers of investment in any one security were limited to 5000*l.* Strangely enough, no director who gave evidence before me retains any recollection of this restriction having been imposed. Certainly it was never observed by the finance committee, and this must have been known to the board from an early date. At a board meeting held on November 14, 1916, a report of the finance committee of that date was read and approved, and such report informed the board of the purchase of 7000 Commercial Bank of London shares at a price of 3*l.* each, and of 25,000*l.* British Government three

months' Treasury Bills. At this board meeting the only director present who was not a member of the finance committee was Sir Douglas Dawson. It was, however, the practice of the secretary to forward to each director a copy of the minutes of the board meetings. The other directors were, therefore, made aware about this time of the fact that the 5000*l.* limit was being disregarded by the committee. The truth is that the restriction was forgotten both by the finance committee and by the board. It was not until May 4, 1920, that the attention of the board was called to it by Mansell, the general manager, who said that he had found in an old minute that there was a limit of 5000*l.* At a board meeting of that date it was accordingly resolved, on the proposal of Lord Ribblesdale, seconded by Sir Douglas Dawson: "That the finance committee be authorised to deal with securities to an unlimited amount, this resolution superseding that passed on the 25th July, 1916." I think that, in the circumstances, it must be taken that at all material times the limit imposed by the resolution of July 25, 1916, had been at first tacitly, and afterwards expressly, revoked by the board. It has been necessary to deal at this length with the constitution and authority of the finance committee, because it was the finance committee that resolved upon the investment of moneys of the company in Claridge's Hotel, Paris, and in the United Brass Founders. [His Lordship then dealt in detail with the facts and evidence concerning these investments and the investment of 150,000*l.* in the Brazilian ranch authorized by the finance committee, and although he considered that as members of the finance committee Mr. Grenside and Mr. Haig Thomas had been guilty of negligence in connection with the investment in the Brazilian ranch, yet he was of opinion that their negligence was not wilful and that art. 150 afforded an answer to any claim against either of them in that respect, and his Lordship came to the conclusion that he was not prepared to find them, either as members of the finance committee or as directors, or any other of the respondent directors, liable in respect of any of the three investments above mentioned. His Lordship continued:]

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I must now deal with the claim of the liquidator in respect of the loan of 110,000*l.* to Mansell. As already stated, Mansell was the general manager of the company. He had held that post from the date of the formation of the company in the year 1908, and appears to have been a man of great ability and experience in all matters connected with insurance. The respondent directors put the greatest trust in him, and, for all that they knew to the contrary, were at all material times justified in so doing. Subsequently to the liquidation of the company, Mansell was put upon his trial for fraud in connection with the affairs of the company and was acquitted. So far, therefore, as he was concerned in the matters now to be related, he is entitled to be absolved from all suspicion of fraud. But unquestionably he betrayed the trust and confidence reposed in him by the respondent directors. He was remunerated by a salary of 2000*l.* a year and a commission on profits, the commission amounting to something between 6000*l.* and 7000*l.* a year. His salary was paid by regular instalments, and need not be further mentioned. The trouble has arisen out of the payments made to him on account of, or in anticipation of, his commission. By January 3, 1919, Mansell had received 6100*l.* on account of his commission for the year ending February 28, 1919, and he was paid two further sums of 2000*l.* and 3000*l.* on January 7 and 21, 1919, respectively. The sum due to Mansell for commission and expenses for the whole year ending February 28, 1919, was 4875*l.* It was therefore obvious by January 3 that Mansell's commission account would be considerably overdrawn by the end of the financial year, especially if, as I cannot doubt was the case, Mansell knew that he would obtain the two further sums to which I have referred. In those circumstances, at a meeting of the finance committee held on January 3, 1919, at which Bevan, Barclay, Grenside and Mansell were present, the chairman, according to the minute of that meeting, stated " that he had received an application from the general manager for an advance of 15,000*l.* at 5 per cent. interest for the purchase of a freehold residential farm property repayable by instalments and

the same was approved." On March 13 a further sum of 9000*l.* was paid to Mansell, making, with the 6225*l.* then due from Mansell on his overdrawn commission account, a sum of 15,225*l.* There was nothing wrong in making a loan to Mansell on proper security. As a matter of fact, however, the company never obtained any security for the loan on his " freehold residential farm." From what happened afterwards, it would appear that the approval of the advance was obtained by Bevan from the finance committee for the purpose of concealing from his co-directors the fact that Mansell was being overpaid on his commission account. Nothing was said to the finance committee about these overpayments at the time, for Grenside was unaware of the fact that Mansell was ever overpaid until the month of March, 1921. The other respondent directors were also in ignorance of this fact, Mr. Haig Thomas down to February, 1921, and the others down to shortly before the liquidation of the company. Whether this ignorance of the respondent directors as to the Mansell overpayments was consistent with the proper discharge of their duties to the company I shall have to consider. For the moment I merely state as a finding of fact that this ignorance existed. Down to March 13 then, Mansell had received some 15,000*l.* in excess of what was due to him for commission, and if the attention of any director had been called to this indebtedness of his to the company, the minute of the finance committee of January 3, 1919, could be referred to as affording a satisfactory explanation. The overpayments however continued. During the year ending February, 1920, Mansell received from the company further sums amounting in all to 44,000*l.*, his commission for that year amounting only to 6797*l.* His indebtedness to the company was thus increased to 54,427*l.* by February 20, 1920, this sum including, of course, the 15,000*l.* sanctioned by the finance committee. In this state of affairs, Mr. Lepine, of the firm of Messrs. Langton & Lepine, the auditors of the company, when conducting the audit for the year ending in February, 1920, sent a report to Mr. Bevan dealing with various questions that remained to be settled

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before the audit could be completed. One of these questions concerned the indebtedness of Mansell, and, as to this, Mr. Lepine wrote in his report as follows: "With regard to the loan to Mr. Mansell we would remind you that the only minute is one dated the 3rd January, 1919, authorising a sum of 15,000*l.* We understand that a further minute is to be recorded at the next board meeting. We would also draw your attention to the fact that no interest has yet been charged in respect of this loan. We, however, are informed that a formal agreement is to be prepared with reference to the loan generally." I shall have to deal with this report more fully, and with certain letters addressed both by Bevan and Mansell to Mr. Lepine in connection with the loan when I have to deal with the claims made by the Official Receiver against the auditors. For the moment I shall confine myself to such facts as affect the respondent directors. It is perhaps needless to say that this report was never communicated by Bevan to any of his co-directors, and that when once Mr. Lepine had closed his audit, relying upon the assurance of Bevan as to the recording of a further minute, and the preparation of a formal agreement, Bevan, for the time being, took no further steps in the matter. The overpayments, however, continued, and by the end of February, 1921, Mansell's indebtedness had increased to 96,233*l.* Now another audit was approaching, and something would have to be done to satisfy Mr. Lepine. Some minute must be recorded and some agreement must be prepared. What followed affords a striking example of Bevan's methods. [His Lordship then dealt with the minute, the entry of which in the minute book, he found on the facts, was fraudulently made by Bevan, and with the agreement which was subsequently made with Mansell for a loan to him of 110,000*l.* (inclusive of the 96,233*l.*), the board's sanction to which his Lordship also found was fraudulently obtained by Bevan, and he came to the conclusion that he could not hold the respondent directors liable for any loss occasioned by the agreement, although, in his Lordship's opinion, it was impossible to acquit Mr. Grenside of carelessness of such a degree as might well have constituted

negligence; but as he had acted in complete good faith, he could not be held guilty of wilful negligence, and having regard to art. 150, his Lordship could not hold him liable for any loss occasioned by the agreement. His Lordship then continued :] I must now consider the question of the responsibility of the respondent directors for the overpayments to Mansell. Every payment made to him on account or in anticipation of commission was made by a cheque drawn in his favour signed, as required by the articles of association, by two directors and also by Mansell himself, or, in I think four instances, by the accountant Mr. Lock. The dates and amounts of the cheques so drawn in favour of Mansell between April 2, 1918, and November 17, 1921, which, after deducting the sums due to him in respect of commission and expenses during that period, amounted to the 110,000*l.*, are set out in certain particulars delivered by the liquidator on March 29, 1923, and are bound up with the pleadings. These cheques are fifty-four in number. A document handed up to me during the trial and numbered 19a gives in each case, with the exception of the cheque on December 9, 1919, for 3000*l.*, the names of the directors by whom the cheque was signed. This document includes, however, by mistake a cheque for 5000*l.* dated September 27, 1921, which has nothing to do with the matter. The Official Receiver contends that each respondent director is at all events liable for the sums received by Mansell by means of the cheques signed by that director. In support of this contention Mr. Topham relied upon the decision of James V.-C. in *Joint Stock Discount Co.* v. *Brown.* (1) In that case directors had expended money of their company in payment for certain shares which the company had no power to acquire. One of the directors named Bravo only joined the board after the transaction had been resolved upon by the board, but he had subsequently signed a cheque for 5000*l.*, part of the moneys in question. In holding him liable James V.-C. said : " Mr. Bravo's case is somewhat different in this respect, that Mr. Bravo was not a party to the original resolution. Mr. Bravo, however,

(1) L. R. 8 Eq. 381, 404.

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signed a cheque for 5000*l.*, part of the moneys in question. He says he signed that cheque as a matter of form. It has been repeated with reference to him and some other of the defendants here that signing cheques in that way is a mere ministerial act. I am startled at hearing any such statement. A company for its own protection against the misapplication of its funds requires that cheques should be signed by certain persons. Of course it is quite clear that no company of this kind could be carried on if every director were obliged to sign every cheque, and it is therefore required that the cheques should be signed by a certain number of persons for the safety of the company. That implies, of course, that every one of those persons takes care to inform himself, or if he does not take care to inform himself is willing to take the risk of not doing so, of the purpose for which and the authority under which the cheque is signed; and I cannot allow it to be said for a moment that a man signing a cheque can say: 'I signed that cheque as a mere matter of form; the secretary brought it to me; a director signed it before me; two clerks have countersigned it; I merely put my name to it.' Most of us have been obliged to trust in the course of our lives to a great number of persons when we have had to sign deeds and things of that kind; but if we trust, of course we must take the consequences of our so trusting. Mr. Bravo in this instance signed the 5000*l.* cheque probably relying that it was all right; but, of course, relying that it was all right, he must be responsible for so trusting that it was all right." In that particular case, if the director had inquired as to the purpose for which the cheque was required, he would have ascertained that it was for a purpose which he must have known or be deemed to know was ultra vires. But a director who signs a cheque that appears to be drawn for a legitimate purpose is not responsible for seeing that the money is in fact required for that purpose or that it is subsequently applied for that purpose, assuming, of course, that the cheque comes before him for signature in the regular way having regard to the usual practice of the company. If this were not so, the business of a large company

could not be carried on. In the case of an insurance company, for instance, the cheques to be signed at the board meeting would often include cheques in payment of insurance claims. If a claim appears to have been examined into and passed by the manager or other proper official for the purpose, a director who signs the necessary cheque in payment of the claim (the cheque being brought before him in the customary way) cannot be expected to investigate the whole matter over again, for the purpose of satisfying himself that the claim is well founded. A director must of necessity trust to the officials of the company to perform properly and honestly the duties allocated to those officials. In many large companies—it was so in the case of the City Equitable—it is the duty of the manager to pay the salaries and wages of the staff. For that purpose cheques are drawn by the directors in his favour, the exact amounts required being calculated by him. So long as there is nothing suspicious about the amount, the directors are justified in trusting him to calculate it correctly, and to use the proceeds of the cheque for the purpose for which it was drawn. The fact, therefore, that a respondent director signed cheques in favour of Mansell for or on account of commission does not necessarily make him responsible to the company for any payments so made to Mansell in excess of what was really due to him. In order to determine whether any respondent director can be made so liable, I must consider the circumstances in which he signed the cheques in question for the purpose of seeing whether there was anything that should have put him on inquiry, either by reason of the amounts for which the cheques were drawn, or of any irregularity in the method in which they were presented to him for payment.

The practice as to the drawing, authorizing, and signing of cheques in the City Equitable was as follows: the cheque books were normally in the custody of Mr. Lock, the accountant, and it was in his department and under his supervision that the cheques for signature by the directors were, or ought to have been, filled up. The request for the drawing of any particular cheque would come from Mr. Mansell or

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Mr. Bevan. Mr. Lock himself drew up about 5 per cent. of the company's cheques, the balance being drawn by members of his staff. The counterfoil was filled up by the person who drew the cheque. Any cheque placed before the board ought, therefore, in the ordinary course, to have passed the scrutiny of the company's accountant. It turns out in fact that in some cases Mr. Mansell got cheques filled up by a member of Mr. Lock's staff without in any way communicating with Mr. Lock. But this could not be known to the directors. In respect of each cheque drawn, except in respect of insurance losses, there was also prepared in the accountant's office a slip, on which was stated the amount of the cheque and the purpose for which it was drawn, and this slip was stamped "Authorised for payment at Board Meeting"—a space being left for the date of the meeting. Before the meeting of the board, or committee of the board, at which cheques were to be signed, a list of them was prepared in the accountant's department. Up to the end of the year 1918 this list stated, in respect of each cheque, the name of the payee, the amount of the cheque, and the purpose for which it was required. But early in the year 1919 the practice was altered without the knowledge of any director, except possibly Mr. Bevan, and for the future the list merely gave the amount of the cheque without disclosing the name of the payee or the purpose for which the money was required. Neither Mr. Lock nor Mr. Witts, the secretary of the company, could state upon whose authority the change was made. But it seems probable that it was made upon the instructions of Mr. Mansell. The list, both before and after this change in practice, was sent from the accountant's department to that of the secretary to enable him to prepare the agenda for the directors' meeting. The list was not however transcribed in the agenda book, but merely the total amount for which cheques were required. The list itself never came before the directors. At the directors' meeting the cheque books were on the table together with the slips to which I have referred, and, in the case where insurance losses were to be paid, the papers relating to the claim. The meeting

would resolve that cheques be drawn to the amount stated in the agenda book, and each cheque would be signed by any two directors that happened to be present. In the case of the cheques with which I have particularly to deal, and also no doubt in other cases, the cheque had as a rule been previously signed by Mr. Mansell or Mr. Lock, and the counterfoils initialled by the latter. When the directors had signed a cheque they initialled the relevant slip and the cheque was complete. Except in one respect, to which I will call attention later, this practice in relation to the company's cheques is not open to criticism. Every director who signed a cheque at a directors' meeting would see from the slip and the counterfoil the purpose for which the cheque was required. He was, moreover, entitled to assume that the cheque had been passed by the general manager, the accountant and the secretary. He would therefore have done all that could reasonably be required of him as to satisfying himself both as to the purpose and as to the authority for signing the cheque. There were certain occasions upon which a cheque had to be signed between the directors' meetings, but inasmuch as none of the Mansell cheques were signed in this way I need not investigate that matter further. All the Mansell cheques were signed by meetings of the board or a committee of directors in the manner which I have described. So far as procedure was concerned, there was no irregularity of which any respondent director had notice, nor was there anything about the amount for which any cheque was drawn that ought to have excited suspicion. No single cheque in favour of Mr. Mansell exceeded 3000*l.* with the exception of one for 9000*l.* drawn on March 13, 1919. This cheque, however, which was drawn in consequence of the resolution of the finance committee of January 3, 1919, was not signed by any respondent director other than Mr. Grenside, and he had been a party to, and therefore knew of, the resolution. No single cheque, therefore, with the exception that I have mentioned, exceeded what a director might reasonably consider to be properly payable to Mansell on account of or in anticipation of his commission.

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The real difficulty arises by reason of the frequency and the total amount of such cheques signed by some of the respondent directors. In the cases of Lord March and Mr. Milligan there can be no criticism in this respect. The former only signed three Mansell cheques in the year 1920, totalling 7000*l.*, and two in 1921, totalling 4000*l.* The latter only signed two in 1919 and two in 1920, the total amounts being 4000*l.* and 6000*l.* respectively. Having regard to the large sums being earned by Mansell in commission, there was nothing in these figures that ought to have excited suspicion. The two cheques signed by Mr. Milligan in 1919 were indeed signed upon the same day—namely, August 5. But they were drawn upon different banks and would, therefore, be in different books, and Mr. Milligan did not realize when signing the second that he had already signed one for a similar amount. The same thing happened upon two other occasions in the case of others of the respondent directors. It would appear that the device of drawing two cheques in Mansell's favour on the same day was resorted to whenever it was desired that he should be paid at one time more than 3000*l.* on account of his commission. It will be observed by a reference to the particulars of the points of claim that with the exception of the cheque for 9000*l.* already mentioned the Mansell cheques during 1919 were usually for 2000*l.* and in 1920 were usually for 3000*l.* This increase would not arouse any suspicion, for the profits of the company were steadily increasing. But if Mansell required at one time 4000*l.*, as he did on August 5, 1919, and September 16, 1919, or 5000*l.*, as he did on November 4, 1919, two cheques were prepared in the accountant's office, each of which was drawn for half the amount required and upon different banks. Seeing that the number of cheques drawn at the directors' meetings was usually anything between 60 and 100, it might well happen that a director would fail to notice that he was signing two cheques for Mansell on the same day, and this indeed happened on each of the occasions referred to. But had any director when signing the cheques in one book recollected that he had already

signed one in Mansell's favour in the other, I cannot help thinking that, as was suggested by Sir John Simon, the existence of two cheques would have been readily explained as being due to the carelessness of some official in the accountant's office. It is impossible not to feel some sympathy for the respondent directors, hoodwinked as they were by a fraudulent chairman and not receiving proper protection from the officials in whom they placed their trust.

To return, however, to the particular cases of Lord March and Mr. Milligan, I cannot find them guilty of any breach of duty merely because the amounts for which they signed cheques in Mansell's favour did not make them suspect that he was being overpaid. In the case of all the other respondent directors, however, there is to be found a circumstance that is absent from the cases of Lord March and Mr. Milligan. For each one of them signed in the course of one or both of the financial years 1919 and 1920 cheques for more than it was reasonable to suppose could be due or accruing due to Mansell in respect of his commission. This was more particularly so in the case of Mr. Grenside. For the financial year ending February, 1920, he signed cheques in Mansell's favour for no less than 21,000*l.* exclusive of the 9000*l.* cheque on March 31, 1919, given to complete the loan to Mansell of 15,000*l.* For the financial year ending February, 1921, the cheques so signed by him amounted to 26,000*l.* That he did not in fact realize what was the aggregate amount of cheques signed by him in each of those years is, in my judgment, perfectly clear. But was this ignorance on his part consistent with a proper discharge of his duty to the company? This question must, I think, be answered in the affirmative unless it was his duty to the company to keep, and from time to time to check, a list of all the cheques he signed, or unless it was his duty to the company to possess a better memory than that with which nature had endowed him. Let me take the financial year ending in February, 1921. During this year he signed cheques for the following amounts: 2000*l.* on March 2, and another 2000*l.* on March 16 —3000*l.* on May 4, a like sum on June 15, July 6, July 20,

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September 17, November 2—1000*l.* on December 7 and 3000*l.* on February 1. Now, although it was his duty to satisfy himself as to each Mansell cheque as to the purpose for which and the authority under which he was signing it, when once he had done this, there was nothing in the amount of any individual cheque to impress upon his mind the fact of his having signed it. It would appear to him to be a perfectly proper thing to sign a cheque for 2000*l.* on March 16 in respect of, or on account of, commission, and the fact that he had signed this cheque among a hundred others might not unreasonably escape his memory when signing another equally innocent looking and apparently regular cheque a fortnight later. Even more excusable might be his failure to remember the signing of both these cheques when he signed the cheque for 3000*l.* on May 4. Wisdom after the event shows that he could have detected the fraud that was being practised upon him by somebody by keeping a list of all the cheques that he signed in Mansell's favour. But there was no ostensible reason for doing this in the case of these cheques in particular, and to keep a list of all cheques that he signed would have been quite impracticable and far outside any duty that a director owes his company. Nor can I think that a director fails in his duty by reason of lapses of memory that are in the circumstances reasonably excusable. He only undertakes to bring to the service of the company a memory of the normally imperfect nature, and Mr. Grenside's memory would appear to have been of this order. His greatest lapse in this respect occurred on January 20, 1920, when he was the victim of the two cheque trick. But I am not prepared to treat his failure to realize that he was signing two cheques for Mansell on the same day as inexcusable. I think that Sir John Simon was justified in saying that even now we do not know all that took place in connection with the obtaining of the signatures of the directors to the Mansell cheques. There are one or two incidents, such as the alteration in one case of the entry on the counterfoil from "Loan Account" to "Contingent Commission," and the discrepancy in two other cases between the date borne by the cheque

and that inserted in the counterfoil which gives rise to the suspicion that Mr. Bevan and any accomplice he may have had were possibly employing artifices more intricate than those we know of for the purpose of deceiving his co-directors. Most assuredly his colleagues were deceived, and I can find nothing to suggest that they were more gullible than the majority of mankind.

What I have said about Mr. Grenside applies with even greater force to Mr. Haig Thomas, Sir Douglas Dawson, and Lord Ribblesdale. The last named was not himself in a position to give evidence in explanation of his conduct. As a matter of fact he only signed cheques to the aggregate amount of 11,000*l.* in the year 1919, and 9000*l.* in the year 1920—figures that would not of themselves call for much explanation on his behalf. On two occasions, however, in 1919 he was a party to signing two Mansell cheques on the same day. But in view of the evidence given by his co-directors as to the diligence and interest that he ordinarily displayed in the discharge of his duties I cannot doubt his complete innocence. He was successfully tricked, but cannot, in the circumstances, be blamed on this account. But while freeing all the respondent directors from liability for their individual signing of the Mansell cheques, there is one matter connected with their general practice in relation to cheques that provokes adverse criticism. Before any director actually signs, or at any rate parts with a cheque signed by him, he should satisfy himself that a resolution has been passed by the board, or committee of the board, as the case may be, authorizing the signature of the cheque. In the case where a cheque has to be signed between meetings, he must, of course, obtain the confirmation of the board subsequently to his signature. Such cases are, however, exceptional, and need not be further considered. But, in the ordinary case, the precedent authority of the board or committee ought always to be obtained, and, in the case of the City Equitable, this authority was in truth always obtained, but it was obtained in a way that rendered the precaution practically useless. For, as already pointed out, the authority given

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was merely one for the signing of cheques to an aggregate amount, neither the payee nor the amount of the individual cheques being mentioned. In my opinion this practice was wrong in principle, and, in its result, rendered possible the over-payments to Mansell. For if a proper list of the cheques were read out at the meeting, and were subsequently transcribed into the minutes of the meeting (copies of which were circulated, at any rate, in the case of board meetings), every director would have had brought to his attention, not merely the Mansell cheques that he himself had to sign, but all the Mansell cheques that were being authorized by the directors, and it seems almost certain that one or more of the directors would in that case have been struck by the frequency with which Mansell's name appeared in the list as a payee of large sums, and his overpayments would have been summarily stopped. Whether the omission of the respondent directors to follow the proper practice in giving authority for the signing of cheques constituted negligence on their part may be a question of some difficulty. But if it was negligence it was not wilful negligence as I understand that phrase, so that I need not pursue that matter further. There is, however, one more matter to be mentioned before parting with the question of the Mansell overpayments. In each of the balance sheets for the year ending the last day of February, 1919, 1920 and 1921, the sums then due from Mansell were in fact included. On February 28, 1919, the sum due from him was 6255*l.*, on February 29, 1920, 52,427*l.*, and on February 28, 1921, 96,233*l.* His name, however, did not appear in these balance sheets, nor did these particular sums. They were merely included in the total sum appearing in the balance sheets for 1919 and 1920 as loans at call or short notice, and as loans in that for 1921. Any director, therefore, who inquired, or whose duty it was to inquire as to the loans owing to the company would have discovered, or must be deemed to have discovered, the existence of Mansell's indebtedness. I shall, however, have to consider the whole position of the respondent directors in the matter

of loans when I deal with the question of their liability for the much larger sums that were extracted from the company by Bevan for his own benefit. My conclusions upon that question will govern the question of their liability for the smaller sums extracted for the benefit of Mansell, so far as that liability depends upon the knowledge that they ought to have obtained by inquiring into the state of the company's loans, whether at call, short notice, or otherwise.

I must now turn to the claim made by the Official Receiver in respect of moneys lent to, or left in the hands of, Ellis & Co., the company's brokers. The story of these moneys begins with a resolution of the finance committee of January 30, 1917: "To grant to Messrs. Ellis & Co. a loan of 30,000*l.* against securities with a 10 per cent. margin to be lodged by that firm with the company." There were present at this meeting Messrs. Bevan, Haig Thomas, and Grenside, and the secretary. According to Mr. Haig Thomas, the finance committee subsequently sanctioned an increase of this loan to 100,000*l.*, though, according to Mr. Grenside's recollection, the total amount of the loan ultimately sanctioned by the finance committee was 200,000*l.* There was nothing inherently wrong in such loan, whether it was for the larger or the smaller amount, so long as the security lodged with the company by Ellis & Co. was ample, as it, in fact, was at all times material to the consideration of the present question. At the dates of the balance sheets for 1919, 1920 and 1921 the estimated value of the collateral security held by the company was always largely in excess of 220,000*l.* This security, after the liquidation of the company, realized under 31,000*l.*, but there is no evidence before me that the estimates of the value at the dates mentioned were in any way too large. The amount of the loan was, however, largely increased by Ellis & Co. without the authority or knowledge of either Mr. Thomas or Mr. Grenside. This was rendered possible by the fact that Ellis & Co. had from time to time enormous sums of the company's money in their hands over which, so far as I have been able to ascertain, no one of the respondent directors exercised any control, and

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in respect of which no account was ever asked for or seen by him. These moneys were derived from the sale of investments carried out by Messrs. Ellis & Co. as the brokers of the company, and by cheques drawn on the company's banking accounts in their favour. What purported to be accounts of the dealings of Ellis & Co. with moneys and securities of the company were indeed sent by them to the company, but these accounts never seem to have got further than the accountants' department, and were never seen by any respondent director. Out of the moneys so received by them, Messrs. Ellis & Co. from time to time paid for the more permanent investments that were authorized by the finance committee. This committee, however, except on rare occasions, never concerned itself with the short-dated securities, or with temporary investments such as loans at call on the Stock Exchange or elsewhere. In consequence of this, Mr. Bevan, through his firm, was enabled to deal practically as he thought fit with the available cash of the company that was not required for the investments decided upon by the finance committee. There were two accounts kept by Mr. Lock, the accountant, in the investment ledger in the name of Messrs. Ellis & Co.—namely, a loan account and an investment account, and the entries in these accounts were made by Mr. Lock in accordance with the instructions of Bevan given by him verbally, or through the medium of the monthly accounts. If Bevan required, for his own purposes, a few more thousands of pounds of the company's money reposing in the hands of Messrs. Ellis & Co. he had only to direct Mr. Lock to debit his firm's loan account with the sum required, and the thing was done. In these circumstances it is not surprising that the debit to Messrs. Ellis & Co. on loan account was increased at first to 250,000*l.*, and in February, 1921, to 350,000*l.* The balances in their hands on investment account continued to grow meanwhile, and at times were enormous. It will be sufficient to take the year 1921. On January 14 there was due from Ellis & Co. the sum of 123,055*l.* on investment account. At a meeting of the finance committee held on January 18 at

which Messrs. Bevan, Thomas, and Grenside were present, in addition to the general manager, it was agreed to reduce the company's aggregate holding in industrial securities, and Bevan was authorized to sell certain holdings at his discretion, the proceeds to be invested in Government Bills in due course. Various sales were accordingly carried out by Ellis & Co. during the month of January, with the result that at the end of that month the balance of cash in their hands on investment account was over 550,000*l.* By means of the entry of a perfectly fictitious purchase of Treasury Bills and National War Bonds, purporting to have been made on February 25, and by an unauthorized transfer to loan account of 100,000*l.* on February 28, the balance shown by the books of the company was reduced as at that date to 73,650*l.* But in point of fact this sum of 550,000*l.* in substance remained uninvested in their hands down to the date of liquidation. The National War Bonds and Treasury Bills purporting to have been bought on February 25 were never delivered or intended to be delivered, as will appear later on in this judgment. The pretended purchase was entered in the accounts merely for the purpose of misleading the auditors and the respondent directors and others who might be concerned with the balance sheet of February 28. When, therefore, this date was passed Bevan pretended to sell the bonds and bills, and the balance shown in the books to the debit of Ellis & Co. on investment account would once more have been swollen by the amount supposed to have been realized by this fictitious sale had not Bevan taken steps to avoid it. The steps he took were simple. Of the securities sold by Ellis & Co. in pursuance of the resolution of the finance committee of January 18, 1921, nearly 320,000*l.* worth had been sold to a syndicate of which Bevan was certainly a member, and possibly the sole member. It was, at any rate, clearly under his control. So in the first few days of March Messrs. Ellis & Co., without any authority whatsoever from anyone but Bevan, purported to resell these securities to the company, thus purporting to reduce their debit balance by 319,517*l.* As a matter of fact the proceeds

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of this pretended resale were not actually credited to Ellis & Co. in the company's books until December 31, 1921, that being the date of the first monthly account of Ellis & Co. in which the resale was recorded. It would seem as if the resale were something that Bevan only intended to put forward in case any of his co-directors should discover the amount of the balance due from Ellis & Co. In the meantime further moneys continued to come in by reason of sales of investments and an occasional cheque from the company, and the balance due from Ellis & Co., even if they were credited with the proceeds of the resale, remained during the months of April, May and June at about the sum of 50,000*l.* It was only kept down to this comparatively moderate sum by Bevan taking 190,000*l.* and more for the purposes of the Brazilian ranch, and investing some 40,000*l.* in shares of the United Brass Founders, in both cases without the knowledge or authority of any of his co-directors, as mentioned in an earlier part of this judgment. Finally, when in December, 1921, it had become obvious to Bevan that the amount of his firm's indebtedness could no longer be concealed, Messrs. Ellis & Co. proceeded to unload upon the company a number of doubtful securities, and to debit the company with a further large contribution to the Brazilian ranch. By these means, and by certain cash payments to the company obtained, I know not how, from Ellis & Co. in October, November and December the balance due from them to the company had, according to the company's books, disappeared both on loan and investment account, and a balance was actually shown due to them of 13,950*l.* This balance was, of course, wholly fictitious. If Ellis & Co. were debited, as they should be, with the sale price of the securities purporting to be resold to the company in March, 1921, and the cost at which they had unloaded other securities on the company in the month of December, 1921, the balance due from them on December 31, 1921, amounted with interest to 385,469*l.*, as shown by exhibit " F.G.L. 1 " prepared by the late Mr. Van de Linde. To this, however, must be added the cost price of certain securities, referred to in the

exhibits, which were bought by Ellis & Co., but were never delivered by them to the company, amounting to 47,890*l.*, and for the purpose of estimating the loss occasioned by moneys of the company being left in Ellis & Co.'s hands there should also be added the sums expended by Mr. Bevan without any authority upon the Brazilian ranch and the United Brass Founders, amounting together to another 318,375*l.* The collateral security held by the company as against Ellis & Co.'s loan realized 30,859*l.* The total loss to the company in respect of the loan to Ellis & Co. and by reason of the company's moneys being left in their hands amounted, therefore, to over 720,000*l.*, and I must now consider whether this loss has been occasioned by the wilful negligence or default of any of the respondent directors.

So far as it was due to the loan sanctioned by the finance committee, little remains to be said. The advancing to members of the Stock Exchange of moneys of the company not immediately required for current business purposes, or for permanent investment, if made upon adequate security, was a legitimate method of employing the company's funds, and there was no reason why such an advance should not be made to Messrs. Ellis & Co. merely because Mr. Bevan was a member of that firm. Owing to a serious fall in the value of the securities deposited with the company as cover for the loan, it was, in the end, inadequately secured. But there is no evidence before me to show that any of the respondent directors was aware, or should have been aware, that there was insufficient cover for the loan at any time when intervention on his part could have served any useful purpose. I cannot find that any respondent director was guilty of any negligence in the matter of the loan sanctioned by the finance committee. But the loss that was due to the unfettered control that Ellis & Co. were permitted to exercise over moneys of the company left in their hands gives rise to more difficult questions. The undoubted fact that Ellis & Co. did have this unfettered control was due to the following circumstances. The respondent directors, other than Mr. Haig Thomas and Mr. Grenside, were under the impression

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that it was the duty of the finance committee to see to the proper investment of all the funds of the company not immediately required for the purpose of the company's business. Mr. Thomas and Mr. Grenside, however, thought that the finance committee were only concerned with the permanent investments, and that the temporary investment of the company's funds on loans at call or in short-dated securities was a matter that had been left to the chairman and general manager to arrange. [His Lordship then referred in detail to the evidence of Lord March, Sir Douglas Dawson and Mr. Milligan on this question, and continued :] Now these passages that I have read from the evidence of Lord March, Sir Douglas Dawson and Mr. Milligan certainly seem to indicate that they did not ever seriously bring their minds to bear upon the question as to how and by whom the temporary investments were being made. They appear to have assumed that such matters were being attended to by the finance committee. But such assumption was justified in the case of Sir Douglas Dawson and Mr. Milligan by the terms of the resolution of July 25, 1916 ; for, in my opinion, the duty delegated to the finance committee by that resolution was to act as a finance committee generally in relation to temporary as well as to permanent investments. There is no evidence as to Lord Ribblesdale's views upon the matter. He was, however, present at the board meeting of July 25, 1916, and I cannot doubt that he too must have been under the impression that the finance committee was attending to the investments generally. Any other conclusion would be inconsistent with the evidence given by his co-directors as to his general conduct in discharging his duties as a director. It is also to be observed that in the early days of the finance committee's existence, the board of directors themselves approved certain transactions of the finance committee, which included temporary as well as permanent investments. On November 14, 1916, the board approved the purchase by the finance committee of Treasury Bills ; on February 6, 1917, it approved the loan of 30,000*l.* to Ellis & Co. ; on April 3, 1917, a loan up to 50,000*l.* to Messrs. Sheppard,

Pelley & Co. Lord March did not know the terms of the resolution appointing the finance committee, but he knew, of course, of the existence of this committee, and it was not unreasonable for him to assume (even if he did not know of what had taken place at the board meetings just referred to) that they had been appointed to attend to the company's investments generally. I am not in the circumstances prepared to find any one of these four gentlemen guilty of negligence for omitting to make inquiries as to who were looking after the temporary investments of the company, though, had any inquiries of his been addressed to Mr. Grenside or Mr. Haig Thomas, he would have discovered that they took a very different view as to the precise functions of the finance committee. [His Lordship then reviewed the evidence of Mr. Grenside and Mr. Haig Thomas, showing that they considered and understood that the duty of seeing to permanent investments only, and not also to temporary investments, had been delegated to the finance committee, and continued :] This evidence discloses a truly astonishing state of things. It is the duty of each director to see that the company's moneys are from time to time in a proper state of investment, except in so far as the company's articles of association may justify him in delegating that duty to others. So far as the respondent directors, other than Mr. Haig Thomas and Mr. Grenside, are concerned, they were justified in delegating this general duty to the finance committee, and thought that they had done so. The position of Mr. Thomas and Mr. Grenside was, however, very different. They knew that neither the board nor the finance committee were attending to the temporary investments and were content to leave the duty of doing so to Mr. Bevan and Mr. Mansell. In this they were wrong. Thinking, as they did, that the duty had not been delegated to the finance committee, they should have regarded it as being still reposed in the board as a whole. That Bevan and Mansell were persons enjoying the highest reputation is beside the mark. If the shareholders had desired to leave hundreds of thousands of pounds of the company's money under the sole control

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of Bevan, they would have done so. But the shareholders had preferred to have associated with Bevan a board of six or seven other directors, and it was not for these other directors to leave Bevan to discharge one of the most important of the duties that had been entrusted by the shareholders to the board as a whole, however reasonable and however safe it might have seemed to the directors to do so. Still less would it be permissible to leave the control of the company's temporary investments to the general manager. It is not any part of the functions of a manager of an insurance company to decide upon the method of investment of the company's cash resources. His advice and assistance will no doubt be sought. But the responsibility for the ultimate decision as to investment must rest with the directors or, when the articles permit, with a committee of the directors, and none the less that the investment is only a temporary one. In my judgment, Mr. Haig Thomas and Mr. Grenside were guilty of a breach of their duty as directors in failing to control and safeguard the moneys of the company that were not in a state of permanent investment. If, therefore, they were responsible for losses sustained by their mere negligence, I could not acquit them of responsibility for the whole of the money due from Ellis & Co. at the date of the liquidation in excess of the loan to that firm sanctioned by the finance committee, not merely because that money was allowed to remain in Ellis & Co.'s hands, but on the broader and more general ground that I have mentioned. I should have had to find them responsible for the loss occasioned by any and every temporary investment made by Bevan or Mansell. But this breach of duty on the part of Mr. Thomas and Mr. Grenside was due to nothing more than ignorance of what their duty was in the matter. It is clear that it never occurred to either of them that it was his duty to keep under his own control the matter of the temporary investments. But further than this, it is established to my satisfaction that each of them in fact honestly thought that he did not owe any such duty to the company. In these circumstances, unless I have arrived at a wrong conclusion as to the meaning

of the expression " wilful negligence or default," both of them must be absolved by reason of the 150th article of association from liability for this breach of their duty.

The question of liability for the loss occasioned by leaving money in the hands of Ellis & Co. does not, however, end there, either as regards these two gentlemen or as regards the rest of the respondent directors. For though, as I have already held, none of them is liable merely on the ground that the disposition of the moneys of the company not in a state of permanent investment was left in the control of Bevan or Mansell, he might yet be responsible for the losses occasioned by the improper way in which Bevan in fact disposed of those moneys, so far as such disposition came to his notice or would have come to his notice had he made proper inquiries. In considering this aspect of the case, it is not necessary to draw any distinction between those respondent directors who were and those who were not members of the finance committee. For although the members of the finance committee did, in my opinion, owe a higher duty to the company than the other directors, in the matter of the periodical investigation of the investments of the company, both permanent and temporary, yet as regards the latter class of investment Mr. Thomas and Mr. Grenside did not think that their position was in any way different from that of an ordinary director, and the question of any liability they may have incurred for acting upon this assumption has already been dealt with. In these circumstances, I must treat them as though for the purpose of temporary investments the finance committee consisted of Bevan and Mansell. Treating then all the respondent directors for this purpose as being on the same footing, the question arises as to whether any of them in fact knew of the improper use that was being made by Bevan of the control that had so unfortunately been left in his hands, and secondly, whether they would have known of it had they made all such inquiries as it was their duty to make. As to their knowledge in fact there is no difficulty. Each one was at all material times in complete ignorance that moneys of the company

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were left in the hands of Ellis & Co. It was, of course, known to the directors that moneys of the company were being paid to Ellis & Co., for a large number of cheques were from time to time drawn in their favour and signed by two directors, and on a sale of investments the proceeds would in the first instance be received by them. But the directors were justified in signing the cheques in favour of the company's brokers, seeing that these cheques were placed before them for signature by the responsible officials of the company in what appeared to be the ordinary course and for purposes that appeared to be proper. If, for instance, certain investments had been decided upon by the finance committee, money would necessarily have to be paid to the company's brokers for the purpose; and it was not, in my opinion, the duty of any director who was asked to sign a cheque in favour of the brokers on investment account, that cheque being placed before him by the officials whose duty it was to see that the directions of the finance committee were being carried into effect, to inquire into the question whether the money was really required for the purposes of investment, or to see that the money was in fact applied for such purpose. Nor would a director be liable for allowing proceeds of sale of investments to be received by the brokers. They would only be liable if such proceeds were to their knowledge left in the brokers' hands for a longer time than was necessary. And that this was being done was just the fact of which they were ignorant. [His Lordship referred to the evidence on this point and continued:] But the more difficult question arises as to whether this ignorance of the respondent directors was consistent with a proper discharge of their duties to the company. The answer to this question depends upon how far it was the duty of a director of the City Equitable, not being a member of the finance committee, to ascertain from time to time the manner in which the money of the company had been invested. This question arises not only in connection with the moneys in the hands of Ellis & Co. but also in connection with the overpayments to Mansell. In my opinion, it could not reasonably be expected of such

a director that he should keep himself acquainted at all times with the details of the company's investments. Speaking generally, he would be justified in trusting to the finance committee to perform properly the duties delegated to them. But the duty of making a report to the company in general meeting as to the state of the company's affairs and the amount recommended to be paid in dividend, as required by the 139th article of association, was the duty of the board of directors as a whole and not of the finance committee. For the purposes of enabling them to make such report it was, in my judgment, essential that there should be prepared for the use and information of the directors a complete list of the company's assets. It would be impracticable for every director to go through the list and satisfy himself as to the maintenance of the book values of each security. This task might properly be left to a small committee of directors, upon whose report the others would be justified in acting. But in the present case no such list was ever before the board or was ever called for by any individual director. Mr. Haig Thomas indeed was supplied on two occasions with what purported to be a list of investments, one at some date early in 1919 and the other in April, 1920. The second of these two lists purported to show the investments as they existed on February 29, 1920, Mr. Haig Thomas being told upon the telephone by some individual at the company's office who has never been identified that there had been no change in the investments since that date. This, as a matter of fact, was wholly untrue. Nor were the lists complete lists. The first one, a copy of which was also sent to Mr. Grenside, contained no mention whatever of any loan to or indebtedness of Ellis & Co., and the second one showed a sum of no more than 4690*l.* as due from them on investment account. It seems probable that Mr. Grenside also saw this list. In point of fact, a comparison of the total amount of the assets set out in those lists with the total set out in the balance sheets for these two years would have shown Mr. Haig Thomas and Mr. Grenside that the lists were inaccurate. But they made no such comparison, nor indeed were the lists

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obtained by them for the purposes of the balance sheets at all. These two lists are not in truth relevant to the point that I am considering, but they do provide another illustration of the difficulties with which the respondent directors had to contend by reason of the untrustworthiness of the officials of the company. The list of investments which, in my opinion, the directors should have obtained in connection with and for the purposes of the balance sheet in each year would have been a list that showed in detail all the investments that were lumped together in the balance sheet under general headings, in order that the directors might form some idea for themselves as to whether the total sum brought in as the value of the investments under each general heading was justified for the purpose of the balance sheet and of the dividend that they were recommending. No such list was however called for by any of the respondent directors, in any one of the relevant years, 1919, 1920 and 1921. Had they done so, they would have discovered that Mansell was indebted to the company in 6225*l.* in 1919, 52,427*l.* in 1920 and 96,233*l.* in 1921. They would also have discovered that their brokers owed the company 51,423*l.* in 1919, 15,690*l.* in 1920 and 423,650*l.* in 1921. These three last-mentioned sums were a long way short of a true statement of Ellis & Co.'s indebtedness, but this was due to the fact that in 1919 and 1920, just as in 1921, fictitious purchases of Treasury Bills for a large amount were entered in Ellis & Co.'s accounts for the purpose of reducing their indebtedness as shown by the company's books. The directors, therefore, would not have ascertained the true state of affairs as regards Ellis & Co., and so far as the years 1919 and 1920 were concerned there would not have appeared to them that there was any cause for criticism or inquiry as to the indebtedness of that firm, seeing that the company held abundant security, and that the debt in each year fell a long way short of the 100,000*l.* that the finance committee had sanctioned. But they would have ascertained that their general manager was indebted to the company in large sums in respect of which the company held no security, and that in the month of February, 1921,

Ellis & Co. had increased the amount of their loan to 350,000*l.* without any authority and held in their hands without security moneys of the company amounting to 73,650*l.* It is therefore reasonable to suppose that had the directors made or caused to be made inquiries as to the items that went to make up the total sums appearing in the balance sheets under the heading of loans at call or short notice in the balance sheets for the years 1919 and 1920, under which headings the debts of Mansell and the loan to Ellis & Co. were included, or as to the items that went to make up the sum appearing in the balance sheet of 1921 under the heading of "Cash at bank and in hand," under which heading the 73,650*l.* due from Ellis & Co. was included, a considerable sum might have been saved to the company. In not making or causing to be made these inquiries the respondent directors, in my opinion, failed to come up to the strict standard of their duty. They appear to have contented themselves with making general inquiries of Bevan on the occasions when the balance sheets came before them for approval, and were satisfied with his assurances, that were no doubt readily forthcoming. For the rest, they seem to have relied upon the certificate of the auditors, which contained a statement that in the belief of the auditors the assets set forth in the balance sheet were in the aggregate fully of the value as stated therein. Having regard to the high reputation that Bevan possessed in the City of London and elsewhere it is not difficult to understand how the respondent directors allowed themselves to be satisfied with the assurances given by him, fortified by the certificate of the auditors. As it turned out, the respondent directors were being tricked and defrauded by Bevan and so were the auditors themselves, and neither these directors nor the auditors received from the officials of the company the protection and assistance that they were entitled to expect. For the moment, however, I am only concerned with the respondent directors, and, though I feel considerable sympathy with them in being surrounded by officials whom events have shown to be unreliable, and in being led by a chairman

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whom events have shown to be a daring and unprincipled scoundrel, I also feel bound to express my opinion that in the particular matter that I am now considering they did less than the law required of them. When presenting their annual report and balance sheet to their shareholders, and when recommending the declaration of a dividend, directors ought not to be satisfied as to the value of their company's assets merely by the assurances of their chairman, even as distinguished and honourable as Bevan appeared at the time to be, nor with the expression of the belief of an auditor as competent and trustworthy as Mr. Lepine was and still is. As I have already stated, a list of the company's assets should have been prepared, and this was never done. But for the 150th of the articles of association, I should, in my judgment, have to hold the respondent directors (other than Lord March) liable in varying degrees for the loss to the company that might have been prevented had such a list been called for on the occasion of the approval by the board of the balance sheets for the years 1919, 1920 and 1921 respectively. Lord March would have to be excepted, inasmuch as he was not present on any one of these occasions. The other respondent directors, however, are relieved from any such liability by reason of the article, for I am quite satisfied that they erred in perfect good faith and in ignorance of what was their duty to the company in this respect.

One more matter has to be dealt with before leaving the subject of the indebtedness of Ellis & Co. At all material times during the years 1919, 1920 and 1921 securities of the company were left in the hands of that firm. In view of what is now known of Bevan's character, it is not surprising to find that he pledged these securities for his own purposes. The larger number of them were by good fortune sold subsequently and the proceeds in due course credited to the company. But at the date of the company's liquidation and Ellis & Co.'s bankruptcy, the securities to which I have already referred, and of which the book value was 47,890*l.*, still remained in their hands and were wholly lost to the company. The Official Receiver accordingly seeks to charge the respondent

directors in any case with this sum upon the ground that it was a breach of their duty to allow securities of the company to be retained by their brokers. Had any one of the respondent directors been aware of the fact that securities were left in the hands of Ellis & Co. for safe custody he would have been guilty of breach of duty if he had not insisted on the practice being summarily stopped. But in fact they were all ignorant that this was being done. The Official Receiver contends, however, that this ignorance does not protect them, as they ought to have initiated some system of safeguarding the company's securities under which it would have been impossible for Ellis & Co. to obtain possession of them. This object could, no doubt, have been attained if the directors had taken the securities to the bank in person or had personally supervised the locking up of the securities in a safe, retaining sole control of the key. But it is not the duty of a director of such a company as the City Equitable to see in person to the safe custody of securities. That is one of the matters which the directors must almost of necessity leave to some official who is at the office daily, such as the manager, accountant or secretary. When an investment is made through the brokers, it would be quite impracticable for the directors to receive actual delivery of the securities. So too when investments are sold, delay and great inconvenience would result if the delivery of the securities to the brokers had to await a meeting of the board or of a committee of directors. The respondent directors would therefore be justified in trusting to Mr. Mansell, their general manager, or Mr. Lock, their accountant, to perform the duty of putting into safe custody the securities of the company. And this is what in fact the respondent directors appear to have done. [His Lordship referred to the evidence in support of this statement and also the evidence of Mr. Lock, the company's accountant, showing that in point of fact and without the knowledge of the respondent directors, but with the connivance of Bevan and Mansell, Ellis & Co. had almost complete control of the company's securities, and continued:] No system could protect the securities against this sort of thing short of

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personal supervision of the securities by the respondent directors themselves, and such supervision they are not bound to give. I cannot hold them liable for any loss sustained by reason of the company's securities being retained by Messrs. Ellis & Co.

The next charge against the respondent directors with which I have to deal is in respect of a sum of 6952*l.* 19*s.* 7*d.*, which has been generally referred to in these proceedings as a loan to Bevan, but which is more accurately described as moneys of the company misappropriated by him. It can be dealt with comparatively shortly. [His Lordship reviewed the evidence, and held that the "loan to Bevan" was founded on a minute fraudulently forged and entered by Bevan, and that none of the respondent directors was liable for this loan or for the Saskatoon loan, and continued:] Only two matters remain to be considered, so far as the respondent directors are concerned. These are the two payments of dividends in the year 1921. Of these, one was recommended by the directors at the Board meeting of May 20, 1921, and declared at the annual general meeting of the company in June, 1921, in respect of the year ending February 28, 1921. The other, which was an interim dividend, was declared by the directors at a board meeting held on November 1, 1921, in respect of the half year ending on August 31, 1921, and is stated in the points of claim to have been paid on November 18. It is alleged by the Official Receiver that both these dividends were paid out of capital. All that I need say about this allegation is that there is no sufficient evidence to support it. If the assets comprised in the balance sheet of 1921 were on February 28 of the value, or even somewhere near the value, therein stated, the first dividend was most assuredly not paid out of capital. Nor was the interim dividend, unless by the month of November those assets had depreciated considerably in value. But no evidence was adduced before me as to the value of the assets at the critical times. It does indeed seem probable that some of the assets, and notably the debt due from Ellis & Co., had depreciated considerably in value by November. But

I do not know that it is even probable that the depreciation had been so great as to render improper a payment of the small interim dividend amounting only to some 15,000*l.* In any case I cannot hold the respondent directors guilty of a payment of dividend out of capital on mere probability. The onus of proving his case is upon the Official Receiver, and this onus he has not discharged. It is not for the respondent directors to prove, especially after this lapse of time, that the dividends were in fact paid out of profits. There is certainly some ground for suggesting that, having regard to a certain shortness of cash at the company's disposal in the month of November, 1921, the declaration of the interim dividend was somewhat unwise. The payment of the dividend, however, was only resolved on after a very full discussion by the directors then present, and after hearing from Mr. Mansell personally, or through Bevan, a satisfactory account of the condition of the company's insurance business. I am satisfied that, at the time, it appeared to the directors to be a safe and prudent thing to do. In any case a director is not responsible for declaring a dividend unwisely. He would only be liable for paying the dividend out of capital, and I am unable to find that the directors did so in the present case.

The result is that the case of the Official Receiver fails against all the respondent directors. He is, however, entitled to relief against Bevan in respect of many of the transactions to which I have referred. So far as the investment in Claridge's Hotel is concerned, I have not sufficient evidence to justify me in making him responsible for the loss thereby occasioned. But I am satisfied that in the matter of the investments in the United Brass Founders and in the Brazilian ranch, Bevan acted fraudulently, as he did too in the matter of the loan of 110,000*l.* to Mansell and his own misappropriation of the sum of 6952*l.* I propose therefore to declare that in these four matters he was guilty of a fraudulent breach of trust, and to direct an inquiry as to the damages sustained by the company by reason of the two investments, and to order him to repay to the company the sums of 110,000*l.* and 6952*l.* with interest. In respect of the moneys

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owing from Ellis & Co. at the date of the liquidation it would not be right, in the circumstances, to treat him as having acted improperly in making the loan to Ellis & Co. that was sanctioned by the finance committee, which I propose to treat as having been 200,000*l.* The collateral security deposited by Ellis & Co. realized 30,859*l.* 2*s.* 10*d.*, so that the loss to the company in respect of the loan was 160,149*l.* 17*s.* 2*d.* He is, however, liable to make good the difference between this sum and the sum of 407,604*l.* 13*s.* 11*d.* shown as due from Ellis & Co. in the exhibit "F.G.L. 1," and I accordingly make an order against him for payment of 238,454*l.* 16*s.* 9*d.* As, in calculating this sum, he has been charged with the cost price to the company of such of the shares in the United Brass Founders as were never delivered, this fact must be taken into account in ascertaining the damage sustained by the investment in that company. There must be added, however, to the sum I have ordered him to pay 9329*l.* 14*s.* 5*d.* in respect of what has been called the Saskatoon loan.

It remains for me to deal with the charges made against the respondents, Messrs. Langton and Lepine, the auditors of the company. By para. 4 of the claiming part of the points of claim, the Official Receiver asks for a declaration that these respondents were guilty of negligence in respect of the audit by them of the balance sheets of the company for the years ending February 28, 1919, February 29, 1920, and February 28, 1921, respectively, and are liable to pay to the liquidator compensation for the loss sustained by the company by reason of such negligence and breach of duty. The Official Receiver also asked for a declaration that such compensation included the dividends paid in respect of the year ending February 28, 1921, as having been paid out of capital. Mr. Topham, at the end of his reply, however, stated that he did not press for any separate relief in respect of these dividends, but merely for a general inquiry as to the damages sustained by the company by reason of the auditors' negligence. But in any case, as I have already pointed out, the Official Receiver has not proved that the dividends were in fact paid out of capital. Now the negligence and breach

of duty charged at the Bar against the auditors in respect of their audit of the three balance sheets in question come under three heads: (1.) Their misdescriptions in the balance sheets of the debts of Ellis & Co. and Mansell by including them under "Loans at call or short notice" or "Loans" or in the case of part of Ellis & Co.'s debt under the heading of "Cash at bank and in hand," and their consequent failure to disclose to the shareholders the existence of those debts. (2.) Their failure to detect the fact that much larger sums were in the hands of Ellis & Co. at the date of each of the balance sheets than were so included. (3.) Their failure to detect and report to the shareholders the fact that a number of the company's securities, which were in the custody of Ellis & Co., were being pledged by that firm to its customers. I will deal presently with each of these matters in turn, but, before doing so, there are one or two general observations about the auditors that must be made.

The audit in each of the three years was, in fact, conducted by Mr. Lepine alone. His partner, Mr. Langton, had conducted the audits of the accounts of the company from the date of its incorporation until the completion of the balance sheet for the year ending February 28, 1917, but from that time ceased to take any active part in the audits. In the discharge of his duties in the three years, 1919 to 1921, Mr. Lepine, speaking generally, displayed great skill, care and industry. Eloquent testimony of this is furnished by the numerous accounts, memoranda, and reports which he prepared in connection with the three audits, and which were produced by him in the course of his evidence. Each audit took from six to eight weeks to complete, and during that time two or three clerks of the auditors would be in continuous attendance at the company's offices. The work of these clerks would of course be done under the direction of Mr. Lepine who, during the latter part of the audit, was himself in fairly continuous attendance. The late Mr. Van de Linde, who was himself an accountant of great experience, and who, after the company went into liquidation, made an able and thorough examination of the company's

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affairs, testified as to the care and accuracy displayed by Mr. Lepine in the audits. The following passage is taken from his cross-examination by Mr. Stuart Bevan: "Q. 1409. I am quite aware of what the complaints are with regard to Messrs. Langton & Lepine, but putting those on one side, because they have to be investigated to see whether there is any foundation for them at all, does your investigation shew that these audits were very carefully conducted by Mr. Lepine? He was always calling for documents, checking entries and so forth?—Yes. Q. 1410. It must have involved a great deal of work?—Yes, a great deal I think. Q. 1411. And extraordinary accuracy in his figures?—Yes. I think the figures are accurate right through. Q. 1412. I have not yet heard or read, and I have been here all the time, that there is any suggestion that there is any wrong figure?—As far as the figures are concerned, I think there is great accuracy right through. Q. 1413. In fact, throughout, always putting aside these matters we have to address ourselves to, speaking generally, throughout, the greatest care shewn and accuracy achieved?—Yes. Q. 1414. Involving, as you say, a very large amount of investigation and labour?—Yes, I think so." But if in the course of these long and arduous audits Mr. Lepine has in even one instance fallen short of the strict duty of an auditor, he cannot, I apprehend, be excused merely because in general he displayed the highest degree of care and skill. As to what that duty is, there is not much authority to be found in the books. But in *In re London and General Bank (No. 2)* (1) Lindley L.J. dealt at some length with the duties of the auditor of a company. He says this: "It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of a company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders.

(1) [1895] 2 Ch. 673, 682.

His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that. But then comes the question, How is he to ascertain that position? The answer is, By examining the books of the company. But he does not discharge his duty by doing this without inquiry and without taking any trouble to see that the books themselves shew the company's true position. He must take reasonable care to ascertain that they do so. Unless he does this his audit would be worse than an idle farce. Assuming the books to be so kept as to shew the true position of a company, the auditor has to frame a balance sheet shewing that position according to the books and to certify that the balance sheet presented is correct in that sense. But his first duty is to examine the books, not merely for the purpose of ascertaining what they do shew, but also for the purpose of satisfying himself that they shew the true financial position of the company. This is quite in accordance with the decision of Stirling J. in *Leeds Estate, Building and Investment Co.* v. *Shepherd.* (1) An auditor, however, is not bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer; he does not guarantee that the books do correctly shew the true position of the company's affairs; he does not even guarantee that his balance sheet is accurate according to the books of the company. If he did, he would be responsible for error on his part, even if he were himself deceived without any want of reasonable care on his part, say, by the fraudulent concealment of a book from him. His obligation is not so onerous as this. Such I take to be the duty of the auditor; he must be honest—i.e., he must not certify what he does not believe to be true, and he must take reasonable care and skill before he believes that what he certifies is true. What is reasonable care in any particular case must depend upon the circumstances of that case. Where there is nothing to excite suspicion very little inquiry will be reasonably sufficient, and in practice I believe business men select a few cases at haphazard, see

(1) 36 Ch. D. 802.

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that they are right, and assume that others like them are correct also. Where suspicion is aroused more care is obviously necessary; but, still, an auditor is not bound to exercise more than reasonable care and skill, even in a case of suspicion, and he is perfectly justified in acting on the opinion of an expert where special knowledge is required. Mr. Theobald's evidence satisfies me that he took the same view as myself of his duty in investigating the company's books and preparing his balance sheet. He did not content himself with making his balance sheet from the books without troubling himself about the truth of what they shewed. He checked the cash, examined the vouchers for payments, saw that the bills and securities entered in the books were held by the bank, took reasonable care to ascertain their value, and in one case obtained a solicitor's opinion on the validity of an equitable charge. I see no trace whatever of any failure by him in the performance of this part of his duty. It is satisfactory to find that the legal standard of duty is not too high for business purposes, and is recognized as correct by business men." I must now inquire whether, in the matters complained of, Mr. Lepine fell short of the duty of an auditor as so explained and defined.

On February 28, 1919, Ellis & Co., according to the books of the company, owed the sum of 51,423*l.* 19*s.* 4*d.* and Mansell the sum of 6225*l.* Both these sums were included by Mr. Lepine in the balance sheet as of that date under the description "Loans at call or short notice 177,648*l.* 19*s.* 4*d.*" Now it is said that neither of these sums was a loan at call or short notice. Mansell's debt certainly was not. Ellis & Co.'s probably was. But I do not propose to decide this question, for I cannot see that any human being has been misled by these debts being referred to as "Loans at call or short notice," rather than as "Loans." If the description of them in the balance sheet as "Loans" would have induced any director or shareholder to make some inquiry as to their nature, which he was induced to refrain from making by reason of their description as "Loans at call or short notice," the matter would be different. But not only is this inherently

improbable, there is actual evidence that it was not so. For in the balance sheet of February 28, 1921, the description was altered for a reason that will hereafter appear. No longer was there any sum brought in under the former description. The loan to Ellis & Co. and the debt of Mansell were, with some other loans, lumped together in the balance sheet under the generic description "Loans." And just as, in the two preceding years, no director or shareholder made any inquiry as to how the sum brought in under the description of "Loans at call or short notice" was made up, no inquiry was made as to the items going to make up the sum brought in under the heading of "Loans" in 1921. The alteration in the heading did indeed attract the attention of Mr. Milligan. But the only inquiry he made was as to the reason for having so large a sum out on loan, as to which he received a very plausible explanation from Bevan. He made no inquiry as to how the sum was arrived at. The truth is, that the ignorance of the respondent directors and of the shareholders as to the indebtedness of Ellis & Co. and Mansell, so far as it was contributed to by Mr. Lepine, was due to his omission to call specific attention to this indebtedness in the balance sheet by mentioning both the debtors by name. But if the directors choose to lend money to their brokers, or their general manager, there is no reason why they should not do so, nor can I see any reason why the auditor should call the attention of the shareholders specifically to the fact of their having done so. In the words of Lindley L.J. an auditor has nothing to do with the prudence or imprudence of making loans with or without security. He must, of course, take care that he does not bring into his balance sheet at face value a debt that is not a good one. The credit of Ellis & Co., however, was above suspicion, and, in addition, the company held collateral security against their indebtedness to the value of over 286,000*l.* Nor was there any reason to suppose that the debt of Mansell was not good. It was, however, unsecured, and accordingly Mr. Lepine, in his report addressed to Bevan in his capacity of the chairman of the company, called attention to the fact in these terms: "The loans

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177,648*l.* 19*s.* 4*d.* include a sum of 6225*l.* due from your general manager, and for which the company do not hold any security." Mr. Lepine, of course, intended this report to be placed before the board of directors, and was justified in supposing that this had been done. Bevan, in fact, suppressed it, but I cannot see how Messrs. Langton and Lepine can be held responsible for this. Mr. Lepine in this matter did, I think, all that it was reasonable for him to do in the circumstances.

Much of what I have said about the 1919 balance sheet applies to that of 1920. According to the books of the company there was no balance due from Ellis & Co. on loan account on February 29, having regard to the fact that it had all been transferred to investment account. But after this transfer had been made, the books showed a balance due from them on this latter account of 4690*l.* 16*s.* 6*d.*, in respect of which the company held collateral security to the value of over 275,000*l.* But in January of that year Ellis & Co. had debited the company with 161,000*l.* in respect of the Brazilian branch. Now, as already stated, the only sum that the finance committee had authorized in respect of this investment was 150,000*l.*, and this fact Mr. Lepine, with his usual care and industry, had discovered. Having noted it in one of his memoranda of queries, he had an interview with Bevan upon the matter. As a result of this interview, Messrs. Ellis & Co. addressed to the company a letter in the following terms: "Re Ranch Account. You will doubtless remember that in all you have been debited in this connection 161,000*l.*, and the matter was discussed between Mr. Lepine and Mr. Bevan a few days ago. The amount has now been adjusted to your actual participation, namely, 150,000*l.*, so we have credited you the sum of 11,000*l.* with interest from the 31st December, 1919, to the 30th instant, and the amount will appear in your statement of the 30th June." The result of recrediting the company with the 11,000*l.* was, of course, to increase the indebtedness of Ellis & Co. by that amount, and whether it was treated as due from them on loan account or on investment account was not very material.

In the meantime Mansell's debt had increased to 52,427*l.* 14*s.* 5*d.* In the balance sheet this sum, and the 11,000*l.* due from Ellis & Co., are included in a sum of 387,564*l.* 5*s.* 9*d.* brought in under the description of "Loans at call or short notice." The balance due from Ellis & Co. on investment account is included in a sum of 270,000*l.* odd described as being "Cash at bank and in hand." Mr. Lepine seems to have thought that this sum in the hands of the company's brokers was as much cash in hand as if it had been in the hands of one of the company's officials. In this I think that he was wrong, but it would have made no difference to any one had it been included, as it could have been, under the heading of "Loans" or "Sundry debtors." But as regards the debt due from Mansell, the balance sheet is open to a criticism in no way connected with the question whether the debt ought to have been included under the heading "Loans at call or short notice." For the only advance to Mansell that had been sanctioned was one of 15,000*l.* approved of at the meeting of the finance committee on January 3, 1919. Mr. Lepine accordingly looked up this minute, and made inquiries of Mr. Bevan about this and numerous other matters as to which he was not satisfied after making his examination of the books and documents of the company. These inquiries were made at an interview he had with Bevan on June 2, 1920. This interview is dealt with as follows in Mr. Lepine's examination: "Q. Will you tell my Lord what took place between you and Bevan on the 2nd of June?—So far as I remember, Bevan informed me that although the amount authorized by the minute of January, 1919, had been exceeded, it was perfectly in order; that the directors were fully cognisant of the loan which had been made to Mansell in connection with his property, and that but for his absence from London a minute would have been passed at a board meeting by the time I had come to do the audit. Q. That is Bevan's absence?—Yes. Q. Did he say what would be done in the future?—He told me that a minute would be passed at the next board meeting, and some agreement entered into with regard to the matter

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generally. I asked him to confirm that, as to the deeds being in his possession. I asked him to confirm that by letter. Q. One of the queries you raised was as to the security?—Yes. Q. Was anything said about security?—Yes, he told me he held the deeds in his office. Q. What deeds?—The deeds of the property which Mansell had purchased. Q. I see there is a letter from Mr. Bevan about this matter on the 2nd June, 1920, the same day?—It was written on the same day. Q. Was it written after the interview?—Yes. Q. 'I write to say in connection with the loan made by the City Equitable to the manager, Mr. Mansell, we hold certain deeds representing the properties he has purchased in Kent, which, of course, also cover the stock and any other assets on the property.' Mr. Bevan having told you that, and having confirmed it in writing in this way, had you any reason to suppose that it was untrue?—No, not at all. Q. I see you wrote in answer to that on p. 702 a letter of the 3rd of June to Mr. Bevan: 'I am obliged by your four letters of the 2nd instant with reference to various investments made by the above company up to 29th February last. With regard to the loan to Mr. Mansell, this amounted to 52,427*l.* 14*s.* 3*d.* as at 29th February last, which figure has been arrived at after deducting the amount due to him for profit commission for the past year; you will recollect that the only minute with regard to a loan is that of the 3rd January, 1919, which only authorized a sum of 15,000*l.*; I, however, understand that a further minute will be passed at the next meeting of the Board. I will also remind you that Mr. Mansell has not been charged with any interest up to 29th February last, but that you are now giving instructions as to this'?—Yes. Q. Did you accept Mr. Bevan's explanation and believe that a minute would be passed confirming these advances?—Yes." Following this interview, Mr. Lepine made a report to the chairman as in the preceding year, and this report contains the following passage: "With regard to the loan to Mr. Mansell, we would remind you that the only minute is one dated 3rd January, 1919, authorizing a sum of 15,000*l.*: we understand that a further

minute is to be recorded at the next board meeting. We would also draw your attention to the fact that no interest has yet been charged in respect of this loan: we, however, are informed that this matter is now having your attention, and, further, that a formal agreement is to be prepared with reference to the loan generally." Mr. Lepine thereupon allowed the debt to be included in the balance sheet without insisting upon a minute being passed or a formal agreement prepared. Having regard to what we now know, it is no doubt easy to criticize Mr. Lepine's action in doing this. But putting one's self into his place, and looking at the matter as it appeared to him at the time, his action was reasonable, and, except for one qualification, to which I will call attention presently, was not inconsistent with his duty as an auditor. For he had seen the slips that had been initialled by the directors who had signed the cheques in Mansell's favour, and these would seem to confirm the statement of Bevan, if confirmation were required, that the directors were fully cognisant of the loan which had been made to Mansell. The absence of a formal minute recording their approval would not, therefore, be a reason for delaying the completion of the balance sheet, or the issue of the auditor's certificate, especially as he had taken the precaution of referring to the matter specifically in the report that he thought would be shown to the board. But, as usual, this report was suppressed by Bevan, and, as usual, Bevan had lied. Not only had he lied as to the directors' knowledge. He had also lied as to there being any security. And in this lie he was ably supported by Mansell himself. For Mr. Lepine, in accordance with his practice where loans were concerned, had required an acknowledgment of the loan from the debtor. Mansell had accordingly signed a letter addressed to the company in these terms: "Dear Sirs, I beg to confirm that as at the 28th February last the total sum which has been advanced to me on loan account in connection with my property at Pennybridge, Wadhurst, Sussex, is 52,427*l.* 14*s.* 3*d.* I am, yours faithfully, E. G. Mansell, General Manager." The words

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"in connection with my property" were the words that Bevan had used at the interview of June 2 for the purpose of conveying the idea that the loan was secured on Mansell's property, and though Mansell did not say in terms that the loan was so secured, he obviously intended Mr. Lepine to believe that it was. His reference to his property was otherwise meaningless. But it is just in connection with this non-existent security that the qualification to which I referred above must be added to the statement, otherwise well founded, that Mr. Lepine performed his duty as an auditor in this matter. For Mr. Lepine did not insist on inspecting the deeds of the property himself. He accepted the assurance of Bevan that the deeds were in Bevan's office. The whole question as to the duty of an auditor to make personal inspection of securities is, however, dealt with later in connection with the other charges made against Messrs. Langton and Lepine, and need not be further discussed at present.

On February 28, 1921, the position, even as shown in the books of the company, had changed considerably for the worse. There was then, according to the investment ledger, a sum of 350,000*l.* owing by Ellis & Co. on loan account, and 73,650*l.* owing on investment account, while Mansell's indebtedness had increased to 96,233*l.* As regards the latter, Bevan had not caused a minute to be passed or an agreement to be entered into, although, as has already appeared in the part of this judgment that deals with the charge against the respondent directors in connection with Mansell's loan, Bevan was already engaged in the fraudulent device which resulted in the execution of the Mansell agreement. In the balance sheet Mansell's debt and Ellis & Co.'s debt of 350,000*l.* were included in an entry of "Loans 514,633*l.*" The securities held by the company as collateral security for the 350,000*l.* were, on February 28, 1921, worth only 247,570*l.* This, of course, did not satisfy Mr. Lepine, who raised a query upon it which was thus described in his evidence: "The query I did raise was that on the bank certification as to the collateral security the collateral security did not come anywhere near

the amount of the loan. I referred that fact to Mr. Lock, and he informed me that further collateral security had been lodged during, I think, the first week in March, and produced to me the bank's green slip acknowledging those further securities. The bank obviously could not confirm having held them on the 28th February, when they were not lodged until, I think, the 2nd or 3rd March, but I obtained from Mr. Lock, and he showed me, the bank's green slip on which they used to enter securities as they were lodged, or as they were withdrawn, and I think there is a note on the account somewhere to that effect." The note in question shows that the market price of the further securities was 104,000*l.* From Mr. Lepine's point of view the 350,000*l.* was still properly described as a "Loan at call or short notice." But the Mansell agreement had been produced and carefully read by Mr. Lepine in the course of the audit for 1921. In view of this agreement, it was obviously impossible to describe the loan to Mansell as being at call or short notice, and so the general heading was altered to "Loans." This was admittedly a proper description of the 350,000*l.*, and of the sum due from Mansell, unless it was Mr. Lepine's duty to refer to the debtors by name. There was, however, no particular reason why he should have done so. He had again inspected the slips initialled by the directors, who signed the Mansell cheques, and he saw the agreement of March 4, 1921, and the minute of the board meeting at which it purported to have been approved. He had satisfied himself that the 350,000*l.* was secured. It was no part of his duty to criticize or call attention to transactions that were well within the powers of the board, and were, on the face of them, perfectly regular. He had carefully studied the Mansell agreement and had taken the trouble to prepare a fairly full abstract of its contents. He had required that the agreement should be stamped, and had made a note that the policy on Mansell's life was to be assigned to the company. Both of these requirements of his were complied with. I cannot see that his duty required him to do any more. It may at first sight seem somewhat strange that Mr. Lepine

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should not have made some inquiries as to the provision contained in cl. 9 of the agreement under which Mansell was freed from all further liability in case the company ceased to carry on business before the loan had been repaid out of his commission. But in February, 1921, the possibility of such an event happening must have seemed to Mr. Lepine to be so remote a contingency as not to warrant serious consideration. It is indeed to be observed that in the abstract of the agreement that he made he did not think it worth while to include that provision. The abstract does take note of the provision under which the loan was to be cancelled if Mansell ceased to be manager. But, notwithstanding this, Mr. Lepine thought that the loan was well secured. The following passage in his cross-examination in relation to the Mansell agreement and the loan indicates his reasons for so thinking. He was asked this: "Did you think it was quite an ordinary kind of agreement?—I thought that the directors had considered it was in the interests of the company that Mr. Mansell should have this money, and I left it at that, I think. Q. You left it at that?—Yes, except that I wanted to see that the policy referred to, the short-term policy, had been assigned to the company, and I took steps to see that that was done. Q. You realised, of course, that if Mr. Mansell left the service of the company the liability to pay ceased?—Yes. Q. Did not you consider that that was such an extraordinary matter that you should have called the attention of the shareholders to that?—No, I did not. It was the policy of the directors. Q. Of course, you saw that it was only payable out of future commissions?—Yes, I think I did, and I think I worked it out to see if, on the new basis, there was a probability of his paying those. Q. How long did you calculate it would take him to pay them?—I think the instalments are referred to in the agreement. Q. You said you worked it out?—Yes, to see whether his remuneration approximately, on the past basis, as far as one could see, would in any way amount to the instalments referred to in the agreement. Q. From that calculation did you find out how long it would take for him to repay that loan?

—I found at the time on the past basis—unfortunately I have not got my note here, but I think there was some considerable sum over. Q. You put that debt in as an asset of the company for its full value ?—Yes, at that time. Q. It depended, did it not, upon whether Mr. Mansell continued in the employment of the company ?—Yes; but at that time he was in the employ of the company, and the company was a going concern, and I knew how highly the directors valued his services. At that time it was a going concern, and, in my opinion, it was a perfectly good amount of expenditure." In my opinion Mr. Lepine was guilty of no breach of duty in connection with any one of the three balance sheets in the way he dealt with the indebtedness of Ellis & Co., or the indebtedness of Mansell, subject only, as to the latter, to the qualification to which I have already referred in connection with the balance sheet of 1920, and subject, as to the former, to the following observation. The 73,650*l.* shown by the company's books to be due from Ellis & Co. on investment account was included in the balance sheet in a sum of 188,000*l.* odd stated to be cash at bank and in hand. In my opinion it was not cash in hand. It was merely money owing to the company by the brokers, and the company held no security to cover it. But Mr. Lepine had seen a letter of March 1, 1921, written by Ellis & Co. to Mr. Lock for the purposes of the audit, in which it was stated that 50,000*l.* of this money had been earmarked to the company's American account (that is, for the purposes of the company's American business) for remittance during the month of May. There appeared therefore nothing to call for special remark in so large a sum being in Ellis & Co.'s hands, and, having regard to the credit and reputation of that firm, neither Mr. Lepine nor any one else would have felt any anxiety about the money being forthcoming whenever it might be required. Mr. Lepine was cross-examined as to his justification in describing this sum as cash in hand as follows: " Q. Do you seriously say —I want you to consider this answer—that it is proper when you are preparing the balance sheet of the company to whom

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the money is due to describe the money in the hands of the brokers as being cash at bank and in hand?—Yes. The only other alternative, I suggest, is that it might be put as 'Cash at bank and in hand, and on other accounts': that is the only suggestion that I can make as to that heading. Q. Why 'cash' at all?—Because it was the balance of cash in their hands. There was 50,000*l.* which they were retaining, according to their certificate to me, to send to America. I knew they did act as agents in connection with the American business. Q. The expression 'cash' is meant to convey something that is quite liquid?—Yes, absolutely, I quite agree. Q. Do you suggest that this sum of 73,000*l.* was quite liquid?—Yes, I do at that time. My view was then that if the company had asked Ellis & Co. for a cheque for 73,000*l.* on the 1st March they would have got it. Q. Is that still your view?—No, not to-day; one has to judge at the time of the audit. Q. Do you not see now, quite seriously, that this was, in the light of the facts, a serious misdescription?—As I know the facts to-day, yes, certainly, I agree. Q. And you never have described such a sum as this before as cash in hand?—No, because I have never had such a case." There was, therefore, a misdescription, but I should hesitate long before holding Mr. Lepine to be guilty of negligence in this respect. I need not, however, pursue this matter further, because, even if the misdescription did amount to negligence, it caused no damage to the company. Had Mr. Lepine in fact included the money under the heading "Cash at bank and in hand and on other accounts" he would not, in my opinion, have laid himself open to legitimate criticism, and the subsequent course of events would have been in nowise altered.

I now turn to the second head under which the auditors are charged with negligence in the preparation of the three balance sheets. The negligence alleged against them under this head is, in effect, that they did not detect the operation carried out annually by Bevan, and euphemistically referred to in the proceedings before me as the operation of "window dressing." A passing reference to it has already been made

in this judgment. It was an operation that consisted of a pretended purchase by Ellis & Co. of Treasury Bills shortly before, and a pretended resale of the Bills soon after the close of the financial year. The effect of the operation was to reduce to comparatively insignificant proportions the sum shown by the books to be due from Ellis & Co. on investment account at that date. The Bills were never delivered by Ellis & Co., and indeed were never even received by them. The operation was intended, amongst other things, to deceive the auditors as to the extent of the firm's indebtedness to the company, and it succeeded in doing so. The question to be decided is, whether Mr. Lepine was guilty of negligence in allowing himself to be deceived. Now the facts relating to these pretended purchases and sales are, so far as material, as follows: On February 27, 1919, Ellis & Co. ostensibly purchased on their own behalf through Messrs. Kleinworts, an eminent firm of brokers, 200,000*l.* Treasury Bills for 198,576*l.* Messrs. Ellis & Co., of course, had no intention of parting with this sum of cash, so they got Messrs. Kleinworts to make them an advance against the Bills of 198,000*l.* carrying interest at 5 per cent. to March 3, when it had been arranged that Messrs. Kleinworts should sell them. On February 28 accordingly Messrs. Ellis & Co. sent their cheque for 198,576*l.* to Messrs. Kleinworts, who in their turn sent a cheque to Messrs. Ellis & Co. for 198,000*l.* On March 3 Messrs. Kleinworts sold the Bills for Ellis & Co.'s account for 198,600*l.* and sent Ellis & Co. their cheque for this amount. On the same day Ellis & Co. repaid to Messrs. Kleinworts the 198,000*l.* and interest. In the meantime Ellis & Co. had, by letter of February 27, informed Mr. Lock that they had purchased for the company 200,000*l.* Treasury Bills at a cost of 198,576*l.* and had debited that sum to the company in their accounts. On March 3 they credited the company in the accounts with 198,600*l.* as on a sale of such Bills. The result of all this was that in the balance sheet for the year ending February 28, 1919, there appears amongst the investments of the company 200,000*l.* Treasury Bills, and the debt of Ellis & Co. is brought in as 51,423*l.* In

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truth the company never had such an investment, and the debt of Ellis & Co. should have been increased by 198,576*l.* It should be stated, in fairness to Messrs. Kleinworts, that they acted quite innocently in the matter, and did not know that the company was concerned in any way with the transaction. A similar operation was carried out in February, 1920, the amount of the Treasury Bills bought from Messrs. Kleinworts on February 26 being 390,000*l.*, the price 386,420*l.*, Messrs. Kleinworts' loan 385,000*l.*, and the proceeds of the sale of the Bills on March 5 being 386,856*l.* In February, 1921, the operation was repeated. Treasury Bills for 240,000*l.* were bought from Messrs. Kleinworts as on February 25 for 237,513*l.*, Messrs. Kleinworts' loan was for the same amount, and the Bills were sold on March 3 for 237,744*l.* In 1920 and 1921 Messrs. Kleinworts retained the Bills in their own possession as security for the loans to Ellis & Co. In 1919 they would have done so had there been any Bills to keep. But there were not. In the year 1921 there was, in addition, an alleged purchase and resale by Ellis & Co. of 200,000*l.* National War Bonds. In point of fact both purchase and resale took place on March 4, through Messrs. Hopkins, Blake & Co., a firm of brokers. Notwithstanding this, Bevan sent to Mr. Lock a bought note recording the purchase as having taken place on February 25 at a net cost of 191,501*l.*, and this sum was credited to Ellis & Co.'s investment account as on that date.

Now, these being the facts, it is said on the part of the Official Receiver, first, that Mr. Lepine ought to have discovered the fraud that was being perpetrated by Bevan merely from an examination of the company's books, and, secondly, that if he could not discover it in this way he ought to have discovered it by insisting upon an inspection of the Bills. Now, Mr. Van de Linde, who gave evidence on behalf of the Official Receiver upon these points, agreed, as I understand his evidence, that when Mr. Lepine was conducting the audits for the three years in question there was nothing in the books themselves from which Mr. Lepine ought to have discovered the window-dressing transactions. But, as I gather that

the Official Receiver asks me to put a different construction upon Mr. Van de Linde's evidence upon this point, I propose, instead of considering that evidence in detail, to deal with the entries in the books themselves. The essential thing to be borne in mind in considering these entries is that, at the time the audit was taking place, the books had only been made up to the close of the financial year. When, therefore, Mr. Lepine in the months of April and May was conducting the audit for the year ending February 28, 1921, he would see recorded in the investment ledger a purchase on February 25 of 240,000*l.* Treasury Bills. But the sale of these Bills on March 3 would not be so recorded, for the entry of the sale would not be made until after the audit was closed. There would, of course, also be recorded in the ledger the sale in March, 1920, of the 390,000*l.* Treasury Bills, and the Treasury Bills account in the ledger would show that between then and February, 1921, no further transactions in Treasury Bills had taken place. There would be nothing, however, in this circumstance to make Mr. Lepine suspicious unless he happened to remember that he had observed something similar when he was conducting the audits of 1919 and 1920. But to suggest that he was guilty of negligence because in 1921 he failed to recollect what he had seen in 1920 is, I think, to lack a sense of proportion. If Mr. Lepine's duty had been confined to the audit of the Treasury Bills account I could understand the suggestion. But when the magnitude of his task in each year is really understood, the suggestion of negligence in this respect cannot be sustained for one moment. It is, however, pointed out that when conducting the audit for the year 1921 Mr. Lepine had before him in one and the same folio of the investment ledger Treasury Bills account, the records of the sale in March, 1919, the purchase in February, 1920, the sale in March, 1920, and the purchase in February, 1921, and that, apart from all question of memory he was negligent, when conducting the 1921 audit, in not seeing all these four entries, and drawing from them the obvious conclusion. When looking at this folio merely for the purposes of this case, I agree that the

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entries, which are few, do plainly lead to the conclusion that window dressing was taking place. But I cannot see that Mr. Lepine, when looking at the folio for the purposes of his 1921 audit, was in any way negligent in not arriving at the same conclusion. In conducting the audit for one year, he had enough to do in all conscience without looking again at the entries that he had examined, checked and ticked off in the books in the audit of the year before. I cannot hold the auditors guilty of negligence because Mr. Lepine did not discover Bevan's fraud in the matter of window dressing from his inspection of the company's books. Ought he then to have discovered it by insisting on an inspection of the Treasury Bills and, in the case of the year 1921, of the National War Bonds? What he did in fact in each of the three years in question was to accept a certificate from Ellis & Co. that on February 28 or 29, as the case might be, they held, on account of the company, the Treasury Bills and National War Bonds, as well as various other securities of the company that were or were supposed to be in their possession. Mr. Lepine did not insist on a personal inspection of these various securities. Had he done so, he would have discovered that the bills and bonds had been sold soon after the date of the purchase, and the window-dressing nature of the transaction would have been made clear. The question of whether he was justified in accepting these certificates from Ellis & Co. instead of inspecting the bills and bonds personally raises the whole question as to the duty of an auditor in relation to inspection, and must be considered in connection with the third head under which Messrs. Langton & Lepine are charged with negligence. The charge under that head is, in effect, that the auditors are responsible for the damage occasioned to the company, amounting to some 47,000*l.*, by reason of the pledging by Ellis & Co. to their customers and the consequent loss of various securities of the company, in the possession of that firm. It is said by the Official Receiver that this loss would not have occurred had Mr. Lepine insisted on personally inspecting the securities instead of accepting Ellis & Co.'s

certificates, and the Official Receiver makes the charge that, in not undertaking this personal inspection, Mr. Lepine was guilty of negligence. With this charge I must now deal.

That it is the duty of a company's auditor in general to satisfy himself that the securities of the company in fact exist and are in safe custody cannot, I think, be gainsaid. If authority for the proposition be required, it may be found in the passage from Lindley L.J.'s judgment in the *London and General Bank* case (1), which has already been referred to. The auditor in that case, amongst other things, "saw that the bills and securities entered in books were held by the bank," and this the Lord Justice plainly treated as being part of an auditor's "legal standard of duty," though he did not of course mean that in all cases the bills and securities should be lodged with the bank. He meant "with the bank or in other proper custody." Nor is it at all clear whether the Lord Justice meant that in all cases the securities should be personally inspected by the auditor. For an auditor may "see" that the bank holds the securities in the sense that he satisfies himself of the fact. In the case of a responsible and reputable bank this, according to the evidence of Mr. Van de Linde, would seem to be the custom of auditors. But I think that it is a pity that there should be any such custom. It would be an invidious task for an auditor to decide as to any particular bank whether its certificate should be accepted in lieu of personal inspection. The custom, too, at once raises the question, much debated in the course of the evidence before me, whether the courtesy of accepting a certificate should be extended to an insurance company or a safe deposit company. Indeed, if once it be admitted that, in lieu of inspecting the securities personally, the auditor may rely upon the certificate of the person in whose custody the securities have properly been placed, the auditor would be justified in accepting the certificate of any official of the company who happened to be in charge of the safe in which the securities are placed, supposing such official to be a reputable and responsible person. At some time or

(1) [1895] 2 Ch. 673, 682-684.

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another it will, I think, have to be considered seriously whether it is not the duty of an auditor to make a personal inspection, in all cases where it is practicable for him to do so, whatever may be the standing and character of the person or company in whose possession the securities happen to be. I do not, however, propose to investigate this question further upon the present occasion. For an auditor is not, in my judgment, ever justified in omitting to make personal inspection of securities that are in the custody of a person or company with whom it is not proper that they should be left, whenever such personal inspection is practicable. And whenever an auditor discovers that securities of the company are not in proper custody, it is his duty to require that the matter be put right at once, or, if his requirement be not complied with, to report the fact to the shareholders, and this whether he can or cannot make a personal inspection. The securities retained in the hands of Ellis & Co. for periods long beyond the few hours in which securities must necessarily be from time to time in the possession of the company's stockbrokers were not in proper custody. That Ellis & Co. were at all material times regarded, and reasonably regarded, by Mr. Lepine as a firm of the highest integrity and financial standing is not to the point. A company's brokers are not the proper people to have the custody of its securities, however respectable and responsible those brokers may be. There are, of course, occasions when, for short periods, securities must of necessity be left with the brokers, but the moment the necessity ceases the securities should be lodged in the company's strong room or with its bank, or placed in other proper and usual safe-keeping. In my judgment, not only did Mr. Lepine commit a breach of his duty in accepting, as he did, from time to time the certificate of Ellis & Co. that they held large blocks of the company's securities, but he also committed a breach of his duty in not either insisting upon those securities being put in proper custody or in reporting the matter to the shareholders. This was negligence, and, but for art. 150, it would be my duty so to declare and to order Messrs. Langton & Lepine to make

compensation for all the damages that such negligence caused to the company, directing an inquiry to ascertain what those damages were. For it is settled, by authorities that are binding upon me, that an auditor is an officer of the company within the meaning of s. 215 of the Companies (Consolidation) Act, 1908, though Mr. Stuart Bevan, while admitting that it was not open to him to argue the contrary in this Court, reserved to his clients the right to contest the point in a superior one. But art. 150 in express terms includes the auditors of the company in the protection that it gives, and it must be taken to be one of the terms upon which the auditors were employed and gave their services. They are, therefore, protected, unless the negligence of Mr. Lepine in the matter was wilful. This it certainly was not, unless I am mistaken as to the true meaning of the phrase "wilful negligence." I have heard Mr. Lepine's evidence in the witness box, and I have inspected many of the numerous documents prepared by him for the purposes of the audits that he conducted. I am convinced that throughout the audits that he conducted he honestly and carefully discharged what he conceived to be the whole of his duty to the company. If in certain matters he fell short of his real duty, it was because, in all good faith, he held a mistaken belief as to what that duty was. As against him and his partner, the application of the Official Receiver must accordingly be dismissed.

It only remains to deal with the costs of this application. As against the respondent Bevan, the Official Receiver is entitled to an order for payment of his costs, except in so far as they have been increased by reason of the joinder of the claims against the other respondents. As regards the costs of the other respondents I order the Official Receiver to pay them out of the assets, and also to retain out of the assets his own costs, so far as he does not recover them from Bevan. I am aware that there have been cases in which the Court, while unable to fix a director with liability for breach of duty, has, nevertheless, left him to pay his own costs as a penalty for conduct in his capacity of director of which the Court did

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not approve. In the present case, both the auditors and the respondent directors failed in some matters to perform their strict duty, and, but for the provisions of art. 150, I should have had, in respect of those matters, to grant some relief to the Official Receiver. But it would not, in my opinion, be right on this ground to refuse to give them their costs. If I were to do so in such a case as the present, I should, in effect, be depriving them to a material extent of the protection which that article affords, and for which they must be deemed to have stipulated as a condition of the service that they undertook to render.

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The Official Receiver appealed from this decision so far as it affected the auditors, Messrs. Langton & Lepine. The appeal was heard on July 3, 4, 7, 8, 9, 10 and 11, 1924.

Topham K.C., *C. A. Bennett K.C.* and *Harold Christie* for the appellant repeated in substance the arguments used by them in the Court below and referred to the following authorities: *In re London and General Bank* (*No.* 2) (1); *In re Kingston Cotton Mill Co.* (*No.* 2) (2); *In re Owens* (3); *Mucklow* v. *Fuller* (4); *Fenwick* v. *Greenwell* (5); *Drosier* v. *Brereton* (6); *Dix* v. *Burford* (7); *Chapman* v. *Browne* (8); *In re Brier* (9); *Robinson* v. *Harkin* (10); *Dovey* v. *Cory* (11); *In re Young and Harston's Contract* (12); *In re Mayor of London and Tubbs' Contract* (13); *Bennett* v. *Stone* (14); *Lewis* v. *Great Western Ry. Co.* (15); *Forder* v. *Great Western Ry. Co.* (16); *Leeds City Brewery Ld.* v. *Platts* (17); Davidson's Precedents in Conveyancing, 3rd ed., vol. iii., Part I., p. 247.

Stuart Bevan K.C. and *George Phillips* for the respondents were not called upon to argue.

(1) [1895] 2 Ch. 673.
(2) [1896] 2 Ch. 279.
(3) (1882) 47 L. T. 61.
(4) Jac. 198.
(5) (1847) 10 Beav. 412.
(6) (1851) 15 Beav. 221.
(7) 19 Beav. 409.
(8) [1902] 1 Ch. 785.
(9) 26 Ch. D. 238.
(10) [1896] 2 Ch. 415.
(11) [1901] A. C. 477; [1899] 2 Ch. 629.
(12) 31 Ch. D. 168.
(13) [1894] 2 Ch. 524.
(14) [1903] 1 Ch. 509.
(15) 3 Q. B. D. 195.
(16) [1905] 2 K. B. 532.
(17) Post, p. 532 n.

POLLOCK M.R. This case is important in the sense that it has arisen in the course of the liquidation of a notable reinsurance company with many and considerable liabilities. The company was at one time prosperous, and in a short time it was brought to a tragic end by the fraud of its chairman, who was later convicted and sentenced to a term of imprisonment. Its downfall has involved many persons in its ruin and consequent suffering to them. But no development of the law is involved in its termination and the problems raised can be solved by the application of principles already well ascertained. In the course of the liquidation of the City Equitable Company a summons for misfeasance under s. 215 of the Companies (Consolidation) Act, 1908, was taken out by the liquidator against the directors of the company and Messrs. Langton & Lepine, who had for some years acted as auditors of the company. Messrs. Langton & Lepine are auditors of good standing in the City of London, and the appeal is in respect of a judgment given by Romer J. upon the case as presented against them. The learned judge after a long and careful trial came to the conclusion that the liquidator was not entitled to recover from the directors, and the result of his judgment was the same as against the auditors. But the liquidator has appealed before us claiming that the judgment, so far as it has held that the auditors were not liable, ought to be reversed.

I do not propose to restate all the facts. Romer J., in a judgment which deserves more than a passing word of appreciation for its grasp of the details of a long and complicated case, and its co-ordination of the facts, as well as its application of the law to them, has fully presented the facts, and I do not think that his conclusions upon them have been challenged by Mr. Topham on this appeal. I shall therefore not endeavour to recapitulate the facts, but I shall merely refer to such of them as may be necessary.

Before dealing however with the claim against the auditors I must, in order to make my judgment intelligible, first refer to certain features which have been the subject more

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particularly of discussion in this Court. The balance sheets of the City Equitable Fire Insurance Company for the years 1919, 1920 and 1921, were all audited by Messrs. Langton & Lepine, and they all contain the proper statement: "We have obtained all the information and explanations we have required. In our opinion such balance sheet is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of our information and the explanations given us as shown by the books of the company." But it is said as against Messrs. Langton & Lepine that they were guilty of a dereliction of their duty as auditors, and that if they had fulfilled that duty the disaster which overtook the company would not have occurred; or, at any rate, would not have been of such magnitude, and some of the losses incurred by the company would have been avoided. It is, I think, important to mention one or two of the features of these balance sheets. We have before us a very careful and helpful summary of the errors in the balance sheets, and it appears that in each of the balance sheets a course was adopted whereby it was made to appear that there were a larger number of investments in British Government securities than was in fact the case. It is also said that a larger amount was represented as being loans at call or short notice than was the fact, that instead of securities being available in the hands of the company itself or of its bankers, some of them were in the hands of Ellis & Co., and in fact had been pledged by them, and that if the auditors had been more careful they would have discovered these discrepancies between the real facts and those which were presented in the balance sheets. Passing to the balance sheet for 1920 it appears to me that in that there was included in the loans at call or short notice a sum of 52,000*l.*, which was due from Mr. Mansell, the general manager of the City Equitable Company, and also a sum of 11,000*l.*, which was due from Ellis & Co. There were also the same features with regard to apparent investments in Government securities which were not truly made, and there was a considerable

and increased sum due from Ellis & Co. The last balance sheet differs in one respect from the other balance sheets, inasmuch as instead of the loans being described as "at call or short notice" they are described as "loans" only. It appears that the loan to Mansell, which had grown from over 6000*l.* in 1919 to 52,000*l.* in 1920, had reached a figure of 96,000*l.* in 1921. The sum due from Ellis & Co. in 1921 was over 73,000*l.*, but was included in "Cash at bank or in hand," and there was, contrary to the fact, a very much larger representation of investments in Government securities.

Now when one approaches this case, quite apart from the question of law with which I shall have to deal later, it is of the first importance to remember that one is looking into facts which have been subjected to the scrutiny and have been explained by the ability of accountants who have come in to look at all the books, and not only the books of the City Equitable Company but also the books of Ellis & Co. It is not easy to reconstruct the true position as it stood before the auditors when they were called upon to do their duty in the three successive years in which their conduct is challenged. It is also proper to remember that when a big disaster has occurred, such as the failure of this company, which, as I have said, was a notable company in its day, there is, on the part of some, a desire to find a scapegoat who can be made responsible, and possibly make good some of the losses which have occasioned disaster to so many. But it is the duty of the Court, as far as possible, to endeavour to ascertain what was the problem presented to the auditors, and what was the knowledge available to them at the time. It is right, and this is fully recorded in Romer J.'s judgment, to say that the audit in these three successive years, which was carried out by Mr. Lepine, the partner entrusted with it, was carried out with diligence and care. It occupied something like from six to eight weeks, and in a passage in his judgment Romer J. gives a striking testimony from the evidence, to which he adds his own authority, to show that he was quite satisfied that Mr. Lepine had been both diligent and discriminating and had endeavoured to

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bring the very best of his abilities to bear on the problem before him. Romer J. cites a passage from the evidence of Mr. Van de Linde, who testified to the care and accuracy displayed by Mr. Lepine in the audit. Mr. Van de Linde says this: "As far as the figures are concerned, I think there is great accuracy right through," and then in reply to this question: "In fact, throughout, always putting aside these matters we have to address ourselves to, speaking generally, throughout, the greatest care was shown and accuracy achieved?" he answered: "Yes." The learned judge at the close of his judgment says that he is convinced "that throughout the audits Mr. Lepine conducted, he honestly and carefully discharged what he conceived to be the whole of his duty to the company." That judgment was delivered after the learned judge had had an opportunity of hearing a great number of cases cited to him, a good number of addresses from counsel, and after he had spent many days in the hearing and trial of the case. I should like myself to add that upon the facts presented to us, it appears that Mr. Lepine did discover and ask for explanations which do him credit, for it must be remembered that he had to overcome—if he was to succeed in the task which it is now suggested he ought to have succeeded in—the cunning of a dishonest chairman, and he had to circumvent the ingenuity of the general manager, who was concerned at the same time in obtaining for himself an agreement which I should describe as a fraudulent agreement on the face of it. Mr. Lepine had, therefore, set before him a task which must be a difficult one at any time, but one about which, if he failed in it, there would only have been recorded of him that he failed to do what would have been a very signal achievement if he had succeeded; because we are to remember not only what was the position of the City Equitable Company, its directors and its chairman, but the position of Ellis & Co. Ellis & Co., of which the chairman of the company, Mr. Gerard Lee Bevan, was the senior partner, was a firm of stockbrokers of good standing and large business on the London Stock Exchange. Mr. Bevan was a man

credited with very great ability and of great reputation as a financier. Mr. Lepine did discover in the course of his inquiries three points which I desire to mention. With regard to the loan to Mansell he pointed out in 1920 that it had reached a figure of 52,000*l.*, whereas the only minute he could find relating to it authorized a sum of 15,000*l.* and not more to be advanced to Mansell. He made inquiries, and he received the answer from Mr. Bevan himself that a minute would be duly recorded authorizing the loan up to the amount at which it stood—namely, 52,000*l.* It appeared to be regular to Mr. Lepine from this fact, that all the cheques by which the loan had been made, and some slips attached to them, if I read the evidence rightly, bore the signatures of directors, so that it was not a case in which the manager appeared to be helping himself to the money of the company, but one in which the directors were placing in the manager's hands, for some reason which Mr. Lepine may or may not have appreciated, sums which totalled up to 52,000*l.* But Mr. Lepine did discover the discrepancy between the amount of the authorized loan and the amount of the actual loan, and he required and was promised that the matter should be regularized in due course by a minute. Again in 1920 he discovered a matter which he also desired to put right. There was an investment in which the City Equitable Company was concerned in some ranch in Brazil, and payments were made, apparently through Ellis & Co., for the development of that ranch, but it appeared that in the course of 1920, or at the time the balance sheet of 1920 was produced, a sum of 161,000*l.* had been paid through Ellis & Co. to the account or for the purposes of the development of the ranch, and Mr. Lepine discovered that the actual amount authorized according to the minute was 150,000*l.* and no more. We are told that Ellis & Co. in some way, or the partners of Ellis & Co., or Mr. Bevan, or, at any rate, one of what I may call the group of persons concerned, who would be in touch with Mr. Lepine, were also interested in this adventure. When Mr. Lepine called attention to the fact that 161,000*l.* had been sent or dispatched or placed in

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Ellis & Co.'s hands for the purpose of the ranch, and he pointed out that it exceeded the authorized amount by 11,000*l.*, he was then told either by Mansell or by Mr. Bevan that under the circumstances Ellis & Co. would debit it to their account. I suppose in business that meant this, that it was not a matter of very great concern, if all had gone well, whether this money was advanced to the ranch by Ellis & Co. or a partner in Ellis & Co., or one of the persons concerned in it. The sum of 11,000*l.* was comparatively not a very large one, and whether it was debited to one account or another was a matter of little moment. As a matter of fact, in consequence of the information Mr. Lepine received, it was debited to Ellis & Co., and at that time I think there is no doubt from the evidence that Ellis & Co. could have drawn, or certainly were supposed to be able to draw, a cheque at any time for 11,000*l.*, and that 11,000*l.* is found included in the sums at call or short notice. But it is due to Mr. Lepine to say that his diligence did bring him to discover what at any rate was not presented to him in a light which made it easy to discover, and which must have required some accuracy or persistence on his part, first of all to discover, and then to put right. I will mention another matter. There were these so-called "window-dressing" schemes. Here I think one has to be very careful, because at the end of each year the auditor would discover what had happened down to February 28, the date at which the accounts closed, but he would not necessarily know what had happened in that part of the subsequent year during which he was making up the balance sheet, or rather conducting the audit. It is true that if you take the three balance sheets together and cast them in the form of a chart, you can see that an increasing amount of window-dressing was going on, and on the chart you will find that there is a rise in the figures which are manipulated for the purpose of window-dressing, and therefore it is easy to read a danger signal from such a chart. No such chart was available to Mr. Lepine, and we have to take the books singly which were before him and the books, be it remembered, of the City Equitable Company only.

It is not right to treat the evidence which is now before us and its significance as being plain in the years 1919, 1920 and 1921 to Mr. Lepine. For my part, I desire to accept the admirable summary which the learned judge has given of the facts. I have only referred to those two or three outstanding features because they are the salient points in charges which are now made against the auditors.

Now the claim is brought in accordance with the procedure which is rendered available by s. 215 of the Companies (Consolidation) Act, 1908, and as an argument was presented to us for which some foundation could be suggested based in substance upon s. 215, I desire to say, though this is not the first time that it has been said, that that section deals only with procedure and does not give any new rights. It provides a summary mode of enforcing existing rights; and I think that is abundantly shown by *Coventry and Dixon's Case* (1); *In re Brazilian Rubber Plantations and Estates, Ld.* (2); and *Cavendish Bentinck* v. *Fenn.* (3) In *Cavendish Bentinck* v. *Fenn* (3) Lord Macnaghten gives in a sentence or so the principle of which the other cases are illustrations. He says: "That section creates no new offence, and . . . . it gives no new rights, but only provides a summary and efficient remedy in respect of rights which apart from that section might have been vindicated either at law or in equity." Then he goes on: "It has been settled that the misfeasance spoken of in that section is not misfeasance in the abstract, but misfeasance in the nature of a breach of trust resulting in a loss to the company." It is also true that the shareholders of the company are entitled to the protection which is given them by statute. Mr. Topham tried to suggest, if I properly understood him, that some protection is to be found in s. 215, and that for the purposes of the article, which I shall have to deal with in a moment, protection which is given by statute cannot be overcome by an article. There is no doubt that shareholders are entitled to protection, and illustrations of the protection

(1) (1880) 14 Ch. D. 660. (2) [1911] 1 Ch. 425.
(3) 12 App. Cas. 652, 669.

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to which they are entitled may be found in *In re Peveril Gold Mines, Ld.* (1); *Payne* v. *The Cork Co.* (2); and *Newton* v. *Birmingham Small Arms Co.* (3) Taking that last case, as to which I desire to say a word or two, it was there attempted by means of an article to prevent a disclosure being made of a reserve fund to which a portion of the profits of the company was transferred, and it was held that this could not be done by resolutions or by articles, because any such resolution or article would be inconsistent with the obligations imposed upon the auditors by s. 23 of the Companies Act, 1900, which was then the section in force. No doubt, therefore, we must take it, as in these cases and in a number of other illustrations, that the shareholders are entitled to receive the protection given to them by statute in the particular facts and by the particular section referred to in those cases.

I come therefore to consider what is the protection in relation to auditors which is given by statute, and that is to be found in s. 113, sub-s. 2, of the present Companies Act. By that sub-section it is provided that "The auditors shall make a report to the shareholders on the accounts examined by them, and on every balance sheet laid before the company in general meeting during their tenure of office, and the report shall state—(*a*) whether or not they have obtained all the information and explanations they have required; and (*b*) whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs according to the best of their information and the explanations given to them, and as shown by the books of the company." Now the balance sheets for the three successive years I have referred to in form complied with that section. They all contain the usual statement made by auditors, so that prima facie the auditors here have discharged their duty.

It is said that these auditors have failed, and failed particularly in their duty in respect of three matters charged

(1) [1898] 1 Ch. 122. (2) [1900] 1 Ch. 308.
(3) [1906] 2 Ch. 378.

against them. Those three matters are set out by the learned judge in his judgment. They are: "(1.) Their misdescriptions in the balance sheets of the debts of Ellis & Co. and Mansell by including them under 'Loans at call or short notice' or 'Loans,' or in the case of part of Ellis & Co.'s debt under the heading of 'Cash at bank and in hand,' and their consequent failure to disclose to the shareholders the existence of those debts. (2.) Their failure to detect the fact that much larger sums were in the hands of Ellis & Co. at the date of each of the balance sheets than were so included. (3.) Their failure to detect and report to the shareholders the fact that a number of the company's securities, which were in the custody of Ellis & Co., were being pledged by that firm to its customers."

What is the standard of duty which is to be applied to the auditors? That is to be found, and is sufficiently stated, I think, in *In re Kingston Cotton Mill Co.* (*No.* 2). (1) As I have already said it is quite easy to charge a person after the event and say: "How stupid you were not to have discovered something which, if you had discovered it, would have saved us and many others from many sorrows." But it has been well said that an auditor is not bound to be a detective or to approach his work with suspicion or with a foregone conclusion that there is something wrong. "He is a watchdog, but not a bloodhound." That metaphor was used by Lopes L.J. in *In re Kingston Cotton Mill Co.* (*No.* 2). (2) Perhaps, casting metaphor aside, the position is more happily expressed in the phrase used by my brother Sargant L.J., who said that the duty of an auditor is verification and not detection. The *Kingston Cotton Mill* case (1) is important, because expansion is given to those rather epigrammatic phrases. Lindley L.J. says (3): "It is not sufficient to say that the frauds must have been detected if the entries in the books had been put together in a way which never occurred to any one before suspicion was aroused. The question is whether, no suspicion of anything

(1) [1896] 2 Ch. 279. (2) Ibid. 288.
(3) Ibid. 287.

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wrong being entertained, there was a want of reasonable care on the part of the auditors in relying on the returns made by a competent and trusted expert relating to matters on which information from such a person was essential." The judgment of Lopes L.J. as well as that of Kay L.J. may be looked at in support of the words of Lindley L.J., and also in support of what I have called the epigrammatic way of putting the auditors' duty. Now let us apply that to the present case. Mr. Lepine went in and spent six or eight weeks with his clerks upon these books. In many ramifications of the City Equitable Company he finds, on the whole, that all the entries are properly made and all the accounts are in order. He finds in particular that a larger sum has been lent to Mansell than was authorized, but he finds that apparently it was the practice of the directors to pay cheques to him. He finds that the amounts of the cheques which were drawn in his favour were entered up. It is not a case in which the cheques had been drawn and not entered or found in the books in which they ought to have been found, but the sum was not the sum authorized, though it was all there in the books, and he turns for guidance and advice to those persons from whom he is entitled to receive guidance and advice. He turns to the chairman, whose position at that time I have described, and he turns to Mansell, who is obviously a man of commanding position, and on all occasions on which he does so he gets from them satisfactory answers or satisfactory promises, and then one applies this test at a time when no suspicion of anything wrong was entertained—was there a want of reasonable care on the part of the auditors in relying on facts given by competent and trusted experts relating to matters in respect of which information from such persons was essential? I think you can put it interrogatively in this way: Who could be trusted, who could give the information, where would you seek for it more authoritatively than from Mr. Bevan and Mansell? It seems to me that when you apply the standard of care to be exercised, you find that in the course of the audit Mr. Lepine has prima facie applied or conformed to the right standard as laid down

by the Court of Appeal, a standard to which, on the facts, Romer J. says he did conform. His diligence is undoubted, and for my part, as I have said, I think that you ought to give weight to what Mr. Lepine in fact did discover as indicating that he was on the path to discover, if he possibly could, anything that was awry, and that so far from showing negligence or carelessness or not caring how the thing was done and simply trusting wholly to the books, and to Mansell and to Mr. Bevan, you do find in the cases where he was successful in detecting something that was awry, illustration of his diligence and determination to discover what was discoverable.

Now, dealing therefore with the first two claims—that is the claim in respect of the loans at call or short notice—Mr. Lepine had, it seems to me, information which would justify him in putting down those items as loans, and I agree with the learned judge that the putting in of the words " at call or short notice " really was not misleading, and did not cause any wrong result. The learned judge says : " If the description of them in the balance sheet as 'loans' would have induced any director or shareholder to make some inquiry as to their nature, which he was induced to refrain from making by reason of their description as 'loans at call or short notice,' the matter would be different. But not only is this inherently improbable, there is actual evidence that it was not so." Then he points out that there was a variation between " loans at call or short notice " and " loans," and that the attention of Mr. Milligan, one of the respondent directors, was called to it, and he made some inquiries about it upon which some plausible explanation was received from Mr. Bevan merely on the point as to why the loans were so large, not as to what their character was, and whether they were at call or short notice, because be it remembered at that time the company was in good credit, and I do not suppose that the idea that they would ever be pressed or be in any embarrassment if they required money, and had to turn outside their own circle for it, would have created any difficulty at all in the minds of those who either were directors or were constantly dealing

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with them. It seems to me, therefore, that the learned judge is quite right in the way he deals with the first claim. Then I come to the second. "Their failure to detect the fact that much larger sums were in the hands of Ellis & Co. at the date of the balance sheet than were so included." I will come to the question of the signed certificates in a moment, but the mere fact that Ellis & Co. at that time owed 73,000*l.*, or that they put down 11,000*l.* to Ellis & Co. does not seem to me to indicate a danger signal at all. So far as any answers were to be received, or likely to be received, they would be favourable both to Ellis & Co. and to the City Equitable Company, but where you have an atmosphere of complete confidence, indeed of a confidence based on success up to that time in financial matters, it seems to me that there is no reason to hesitate about accepting the view which the company at that time presented to them in their draft balance sheet, that this was a way, and a legitimate way of dealing with the overplus of money due on the Brazilian ranch account, or money due at that time from Ellis & Co., and the fact that Mr. Lepine was unsuccessful in detecting the cunning is quite another matter from saying that he failed to use competence and intelligence in conducting his duties.

Now I come to the last point, part of which is contained in the third charge, and that is the failure to detect that much larger sums were in the hands of Ellis & Co. at the date of the balance sheet, and the failure to detect and report that the securities were in the hands of Ellis & Co. Upon that matter I wish to say a word or two as to the evidence. In fact Mr. Lepine inquired of the bank and obtained a certificate from it that a certain number of securities were in its hands, and he then turned to Ellis & Co., and he received from them, under the signature of Ellis & Co., a certificate attached to the document, apparently not by Mr. Bevan, but by one of the partners, that a number of securities were in the hands, of the stockbrokers. It is said it was quite wrong to accept the certificate of the stockbrokers, and we are asked to accept the evidence of Mr. Cash and Mr. Van de Linde as meaning this, that you may accept the certificate of a bank apparently

in all cases, but you may never accept the certificate of stockbrokers. I cannot agree that the evidence is to be so read, or was intended by the witnesses to be so understood. What I think the witnesses meant to express was this: Banks in ordinary course do hold certificates of securities for their customers; it is part of their business to do so, and therefore certificates in the hands of bankers are in their proper custody, and if a bank is a reputable bank, you may legitimately accept the certificate of that bank, because it is a business institution in whose custody you would expect both to find securities, and also it is respectable; but the fact that it calls itself a bank does not seem to me to conclude the matter, either one way or the other. On the other hand, it may be said that it is the duty of an auditor not to take a certificate as to possession of securities, except from a person who is not only respectable—I should prefer to use the word "trustworthy"—but is also one of that class of persons who in the ordinary course of their business do keep securities for their customers. It may be said that a stockbroker does not in the ordinary course of his business keep securities for his customers, and therefore he is ruled out because the auditor ought not to accept from a person of that class, whether he be respectable or not, a certificate that he has securities in his hands. Now, accepting the rule as so stated, that it is right to find the securities in the hands of a bank, whose business it is to hold securities, and applying the proviso that the bank must be one that is trustworthy, it seems to me that the rule may prima facie be a right one to follow; but it is going too far to say that under no circumstances may you be satisfied with a certificate that securities are in the hands of a stockbroker, because it seems to me that in the ordinary course of business you must from time to time, and you legitimately may, place in the hands of stockbrokers securities for the purpose of their dealing with them in the course of their business. With a large institution like the City Equitable Company, having a very considerable number of investments to make and securities to sell, it may well be that for the convenience of all parties it may have been a useful

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method of business even if examined with the most exiguous care, for the directors to have decided that they would in the interests of their business leave securities of a considerable amount in the hands of their stockbrokers, who, I suppose, at that time held a position not less trustworthy or respected than the City Equitable Company itself. I do not wish in any way by anything that I say to discharge the auditors from their duties as laid down in the *Kingston Cotton Mill* case (1), far less do I wish to discharge them from their duty of seeing that securities are held and accepting the certificate that they are so held only from a respectable, trustworthy and responsible person, be that person a bank or an individual; but in applying my mind to the facts of this case I am not content to say that simply because a certificate was accepted otherwise than from a bank therefore there was necessarily so grave a dereliction of duty as to make the auditors responsible. In my opinion it is for the auditor to use his discretion and his judgment, and his discrimination as to whom he shall trust; indeed, that is the right way to put a greater responsibility on the auditors.

If you merely discharge him by saying he accepted the certificate of a bank because it was a bank you might lighten his responsibility. In my view he must take a certificate from a person who is in the habit of dealing with and holding securities, and whom he, on reasonable grounds, believes to be, in the exercise of the best judgment, a trustworthy person to give such a certificate. Therefore I by no means derogate from the responsibility of the auditor, I rather throw a greater burden upon him; but at the same time, I throw a burden upon him in respect of which the test of common sense and business habits can be applied, rather than impose on him a rigid rule which is not based on any principle either of business or common sense.

So we come to the responsibility which the learned judge finds, and I think rightly, falls upon Mr. Lepine. Now what is that? He finds that in respect of these securities Mr. Lepine did what he ought not to have done by accepting

(1) [1896] 2 Ch. 279.

from Ellis & Co. a statement of the securities which they, at that time, declared that they held. The learned judge says: "In my judgment, not only did Mr. Lepine commit a breach of his duty in accepting, as he did, from time to time the certificate of Ellis & Co. that they held large blocks of the company's securities, but he also committed a breach of his duty in not either insisting upon those securities being put in proper custody, or in reporting the matter to the shareholders." As I have said, the learned judge also finds that in what he did Mr. Lepine acted honestly and in all good faith, "holding the mistaken belief as to what his duty was." I agree with the learned judge. It seems to me that Mr. Lepine has made a mistake, and a grave mistake. In justification of him it may be said that every artifice was brought into play in order to deceive him, and to maintain the apparent responsibility and trustworthiness of Ellis & Co. But that does not discharge him from having put aside what I described to Mr. Topham as the rule of the road applied with the proviso as to business rules and common sense. Mr. Lepine would, prima facie, be liable in respect of that dereliction of duty. But then we find that art. 150 contains important words limiting the responsibility of the officers of the company, including the auditors, who are not to be liable for any "loss, misfortune, or damage which may happen in the execution of their respective offices or trusts, or in relation thereto, unless the same shall happen by or through their own wilful neglect or default respectively." I do not agree with the argument that that article is ultra vires. It does not, in my opinion, offend at all against s. 113 in the sense that it is a contradiction of it. Sect. 113 in laying statutory duties upon the auditors calls on them to exercise those duties, according to the best of their information and the explanations given to them and as shown in the books of the company. Once you have any duty to be performed according to the information given, and explanations offered, you obviously have introduced matters in which discretion is to have play, and it seems to me that the article may quite properly be valid in the sense that it is to discharge

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the auditor from what may be called technical errors, defaults for which he may be held liable in law, but which he may unconsciously have committed.

Now what do the words of the article mean? First of all it is to be observed they are in respect of neglects or defaults, and it is not unimportant to observe that the words are not "acts or omissions," but they are "neglects and defaults," and the observations of Bramwell L.J. in *Lewis* v. *Great Western Ry. Co.* (1) ought to be borne in mind, where he deals with the case of wilful misconduct, calling attention to the fact that it is not wilful conduct, but wilful misconduct. We have here to deal with a case where there has been neglect or default, and then to see whether or not it is wilful. I come, therefore, to consider the meaning of the word "wilful." Now in *In re Young and Harston's Contract* (2) there is a well-known passage in the judgment of Bowen L.J., in which he says: "It (i.e., the word 'wilful') generally, as used in Courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used, is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent." There are numerous other cases to which we have been referred, but in *In re Lord Mayor of London and Tubbs' Contract* (3) it is to be observed that Lindley L.J. says: "I confess that I am more disposed to concur with Lord Bramwell's observations on the term 'wilful misconduct' in *Lewis* v. *Great Western Ry. Co.* (4) They are, in my opinion, quite consistent with Lord Bowen's observations in *In re Young and Harston's Contract* (5), if it be borne in mind that Lord Bowen presupposed knowledge of what was done, and intention to do it, and was not addressing himself to a case of an honest mistake or oversight." Lopes L.J. (6) in dealing with *In re Young and Harston's Contract* (5) and *Lewis* v. *Great Western*

(1) 3 Q. B. D. 195.
(2) 31 Ch. D. 168, 175.
(3) [1894] 2 Ch. 524, 536.
(4) 3 Q. B. D. 206.
(5) 31 Ch. D. 168.
(6) [1894] 2 Ch. 524, 539.

Ry. Co. (1) says: "It is difficult to lay down any general definition of 'wilful.' The word is relative, and each case must depend on its own particular circumstances"; and he also says: "If the neglect or default in this case arose from the voluntary act of the parties, either awake or asleep with reference to their rights and interests, and did not at all arise from the pressure of external circumstances over which they could have no control, I apprehend that the neglect or default was wilful." He is there quoting from the judgment of Shadwell V.-C. in *Elliott* v. *Turner*. (2) Lord Alverstone in *Forder* v. *Great Western Ry. Co.* (3), a later case, adopting the definition given in an Irish case, with which he expressed his agreement, says: "'Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure or omission regardless of consequences.' The addition which I would suggest is, 'or acts with reckless carelessness, not caring what the results of his carelessness may be.'" For my own part, I agree with that definition quoted by Lord Alverstone, with the addition he proposes to make to it. It seems to me in close accord with the previous decisions to which I have already referred, and to give a proper meaning to the words which are before us.

I then come to consider whether or not within that meaning of "wilful," the conduct of Mr. Lepine was wilful so as to render him responsible, or is he relieved by the terms of art. 150? The auditor was confronted with a lot of deceit. Year by year he fulfils his duty in a manner which has certainly received the praise of those who have given evidence about it, and of the learned judge who heard the whole of the facts.

(1) 3 Q. B. D. 195. (2) 13 Sim. 477, 485.
(3) [1905] 2 K. B. 532, 535.

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On a number of occasions he was successful in putting what was wrong, or attempting to put what was wrong, right, and therefore so far as his will and volition went, he was attempting to do his duty. In those circumstances, when you find a default which has been made, and an error of judgment in accepting as trustworthy what is now proved to be untrustworthy, can you say, within the definition, that he has been guilty of wilful neglect or default? For my part, for the reasons I have indicated, and upon the evidence to which I have called attention, it seems to me impossible so to characterise Mr. Lepine's conduct. He did not, to my mind, shut his eyes to conduct which he thought needed criticism; what he did was that, in common with a great number of other persons, he thought the persons with whom he was dealing were trustworthy, and, as pointed out again and again in the cases cited to us, in such circumstances he was entitled to accept the statements which were made to him by those whom he was entitled to trust when he had no reason or call for suspicion. In my opinion the learned judge has quite rightly and accurately applied the law to the facts when he says: "If in certain matters he fell short of his real duty, it was because in all good faith, he held a mistaken belief as to what that duty was." He committed an error of judgment, an error which might have caused the company, or its directors, to take a different course, and might have possibly saved some portion of the disaster, but in what he did I cannot find he was guilty of wilful misconduct. Therefore it appears to me art. 150 protects him.

In those circumstances I am of opinion that the learned judge was right in the judgment which he has given, and that this appeal ought to be dismissed with costs.

WARRINGTON L.J. This is an appeal from an exceedingly clear, careful and thorough judgment of Romer J., and as I agree with the conclusions at which he has arrived, it is unnecessary to deal in detail with many of the features that have been the subject of discussion here, but there is at least

one question of general interest and importance on which I think it is desirable in deference to the arguments which have been addressed to us that I should express my own views in as few words as possible, and that question is the construction of art. 150, which is to say the least of it not uncommonly found in articles of association, and its effect (if any) in modifying or otherwise the ordinary legal obligations of an auditor, especially having regard to s. 113 and s. 215 of the Companies (Consolidation) Act, 1908.

The ordinary duties and obligations of an auditor without reference to this or any other special article or stipulation as to the terms of his employment are stated by Lindley L.J. in full in *In re London General Bank* (*No.* 2). (1) It is unnecessary to read the whole of that part of his judgment which deals with the point, but I think it is perhaps desirable to read the following passage: "It is no part of an auditor's duty to give advice, either to directors or shareholders, as to what they ought to do. An auditor has nothing to do with the prudence or imprudence of making loans with or without security. It is nothing to him whether the business of the company is being conducted prudently or imprudently, profitably or unprofitably. It is nothing to him whether dividends are properly or improperly declared, provided he discharges his own duty to the shareholders. His business is to ascertain and state the true financial position of the company at the time of the audit, and his duty is confined to that." He then proceeds to discuss in what way he is to perform that duty in reference to examining the books of the company and verifying the statements contained therein in order that he may be able truly to certify that which he has to certify under the Companies Acts. Then he goes on to point out that an auditor is not an insurer; that he is not bound to do more than exercise reasonable care and skill in making inquiries and investigations, and further that what is reasonable care in any particular case must depend upon the circumstances of that case.

Again in *In re Kingston Cotton Mill Co.* (*No.* 2) (2)

(1) [1895] 2 Ch. 673, 682.

(2) [1896] 2 Ch. 279, 284.

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Lindley L.J. in dealing with one particular point that arose in that case says: "It was further pointed out that what in any particular case is a reasonable amount of care and skill depends on the circumstances of that case; that if there is nothing which ought to excite suspicion, less care may properly be considered reasonable than could be so considered if suspicion was or ought to have been aroused. These are the general principles which have to be applied to cases of this description. I protest, however, against the notion that an auditor is bound to be suspicious as distinguished from reasonably careful." In that case it was accordingly held that the auditor was entitled to accept the certificate of the company's manager, though on subsequent investigation it turned out that the manager had been for some years defrauding the company and that his certificate was intended to cover up those frauds. The duty of the auditor is to verify the facts which it is proposed to state in the balance sheet, and in doing so to use reasonable and ordinary skill. I need say no more about the general duties of an auditor.

The next question is to consider what is the true construction of art. 150, and whether that article bears upon or modifies what would, in the ordinary course, be his prima facie duty and responsibilities—not so much his duty as his responsibilities. The article, so far as it is material, is in these terms. I am not going to read the first part of it, which provides for the indemnity, but the last paragraph only. "None of them"—that is, certain directors and officers who have been enumerated, including the auditors—"shall be answerable for"—amongst other things—"any other loss, misfortune or damage which may happen in the execution of their respective offices or trusts, or in relation thereto, unless the same shall happen by or through their own wilful neglect or default respectively." In the first place, I think that that article, as the learned judge has held expressly in the case of the directors and impliedly, if not expressly, in the case of the auditors, does in such a case as the present form part of the contract between the company and the

auditors, and for the reason that auditors are engaged without any special terms of engagement. When that is the case, then if the articles contain provisions relating to the performance by them of their duties and to the obligations imposed upon them by the acceptance of the office, I think it is quite plain that the articles must be taken to express the terms upon which the auditors accept their position. Of course, if the terms of their employment are expressed in a separate document, then that document must be taken to define the conditions of their engagement, and it would not be proper to assume any implied terms either from the provisions of the articles or elsewhere. But in the present case I think it is quite plain that the terms of art. 150 do, according to their proper construction, whatever that may be, effect a modification in what would prima facie be, but for that article, the obligation and liability of the auditors. What, then, is the effect of the article? It is, I think, plainly in some way, whatever that may be, when you ascertain its true construction, to excuse the auditors from being answerable for loss occurring in relation to their office, except in the particular events which are therein specified—namely, those which happen by or through their own wilful neglect or default—and that it would be improper to describe as a misfeasance any act or omission of the auditors which, having regard to that article, would not result in their being answerable for the loss which may be occasioned thereby. That last remark becomes important when one has to deal with the argument addressed to us on the construction of s. 215. What then is the meaning of a loss which happens by or through their own wilful neglect or default? Bear in mind that the words are not "by or through their own wilful act or omission." We have, therefore, not merely to look at the act or omission in itself and see whether there was a conscious will impelling the person in question to commit that act or to omit to do the thing which is suggested to be wrongly omitted, but we have to consider whether the neglect or default was or was not wilful. In saying that, I am only really repeating what was said in much better language

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than I can find to use by Bramwell L.J. in *Lewis* v. *Great Western Ry. Co.* (1) He was there dealing with a case of wilful misconduct with reference to a business document—a contract by a railway company for the carriage of goods by railway—and he says: "'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the *mis*conduct, not the conduct, must be wilful. It has been said, and, I think, correctly, that, perhaps, one condition of 'wilful misconduct' must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other 'wilful misconduct.' I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, 'Now this may or may not be a right thing to do.' He might say, 'Well I do not know which is right, and I do not care; I will do this.' I am much inclined to think that that would be 'wilful misconduct,' because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct." Then he goes on at the end of his judgment to deal with the facts of the case, and says (2): "I cannot think that there was evidence in this case to shew, or on which the learned judge could properly find, that the men who packed these cheeses—who were in London, a place from which much Cheshire cheese is probably not exported—knew that they were doing wrong, or, at all events, that they were aware that mischief might result, and that they, improperly, failed to inform themselves as to whether mischief would or would not result from it." Then Brett L.J. says (3): "In a contract where the term 'wilful misconduct' is put as something different from and excluding negligence of every kind, it seems to me that it must mean the doing of something, or the omitting to do something, which it is wrong to do or to omit, where the person who is

(1) 3 Q. B. D. 195, 206. (2) 3 Q. B. D. 207.
(3) 3 Q. B. D. 210.

guilty of the act or the omission knows that the act which he is doing, or that which he is omitting to do, is a wrong thing to do or to omit; and it involves the knowledge of the person that the thing which he is doing is wrong; I think that if he knows that what he is doing will seriously damage the goods of a consignor, then he knows that what he is doing is a wrong thing to do; and also, as my Lord has put it, if it is brought to his notice that what he is doing, or omitting to do, may seriously endanger the things which are to be sent, and he wilfully persists in doing that against which he is warned, careless whether he may be doing damage or not, then I think he is doing a wrong thing, and that that is misconduct, and that, as he does it intentionally, he is guilty of wilful misconduct; or if he does, or omits to do something which everybody must know is likely to endanger or damage the goods, then it follows that he is doing that which he knows to be a wrong thing to do. Care must be taken to ascertain that it is not only misconduct but wilful misconduct, and I think that those two terms together import a knowledge of wrong on the part of the person who is supposed to be guilty of the act or omission." Now Romer J. dealing with that point says: "But if that act or omission amounts to a breach of his duty, and therefore to negligence, is the person guilty of wilful negligence? In my opinion that question must be answered in the negative unless he knows that he is committing and intends to commit a breach of his duty, or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty."

With that summary of the result of the authorities I agree. It is said that that view of the meaning of the words "wilful neglect or default" is inconsistent with what has been decided by the Courts in certain cases with reference to the duties of trustees, and also with the judgment, or what is supposed to be the true effect of the judgment, of Bowen L.J. in a vendor and purchaser's case: *In re Young and Harston's Contract.* (1) With all respect to counsel who cited those trustee cases to us, I think there is great danger of being

(1) 31 Ch. D. 168.

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misled if we attempt to apply decisions as to the duties of trustees to a case as to the conduct of persons in the position of the auditors in this case. In the case of trustees there are certain definite and precise rules of law as to what a trustee may or may not do in the execution of his trust, and it is no answer for a trustee to say, if, for example, he invests the trust property in his hands in a security which the law regards as an unauthorized security: "I honestly believed that I was justified in doing that." No honest belief will justify him in committing that which is a breach of such a rule of law, and therefore the question which we have to determine in expressing a view on the construction of such words in a contract like the present is not solved by seeing how the question has been determined in a case relating to the duties of a trustee. With regard to *In re Young and Harston's Contract* (1), when the judgment of Bowen L.J. is read in connection with the facts of that case it seems to me that it is not inconsistent either with the decision in *Lewis* v. *Great Western Ry. Co.* (2) or with that at which Romer J. has arrived in the present case, and for this reason: in *In re Young and Harston's Contract* (1) the default in question was that the vendor being under an obligation to execute, on September 8, a conveyance of property which he had agreed to sell to the purchasers, went abroad two days before, leaving no address, so that it was impossible for him to execute the conveyance on that day. Now it was plainly a default not proceeding from ignorance, but plainly a wilful default, because the vendor had himself put it out of his power, and apparently deliberately, to do that which he was bound to do on that day, and that was held to be wilful default. Then the words of Bowen L.J. must be read with reference to the facts before him, and there is nothing in his analysis of the meaning of the word "default" and the meaning of the word "wilful" which in any way conflicts with what I venture to think is the true mode of dealing with the construction, not of either word by itself, but of the entire expression "wilful neglect or default." I think,

(1) 31 Ch. D. 168. (2) 3 Q. B. D. 195.

therefore, that Romer J. was quite right in arriving at the conclusion that a person is not guilty of "wilful neglect or default" unless he is conscious that in doing the act which is complained of, or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, and also, as he said, recklessly careless whether it is a breach of duty or not.

But then it is said that if the article has that effect, and if, as I think it does, it modifies the prima facie obligation of the auditors, it is contrary to the provisions of s. 113 and s. 215 of the Companies (Consolidation) Act, 1908. With all respect I cannot agree. Sect. 113 does not lay down any rule at all as to the amount of care, or skill, or investigation, or anything of that kind, which is to be brought to bear by the auditors in performing the duties which are imposed upon them. All that the section imposes upon the auditors is the duty of making a report to the shareholders upon the accounts which they examine, and upon every balance sheet laid before the company in general meeting during their tenure of office, and to state in their report whether or not they have obtained all the information and explanations which they have required, and whether, in their opinion, the balance sheet referred to in the report is properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, according to the best of their information and explanations given to them and as shown by the books of the company. It says nothing as to what they are to do in order to form that opinion, or to ascertain the truth of the facts to which they are to certify. That is left to be determined by the general rules which, in point of law, are held to govern the duties of the auditors, whether those rules are to be derived from the ordinary law, or from the terms under which the auditors are to be employed. Art. 150, therefore, in no way conflicts with s. 113 of the Act.

Then with regard to s. 215, if I am right in what I have already said, it is quite plain that nothing is referred to in that section as a misfeasance, except an act or default which would, having regard to the relations between the auditors

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and the company, be a misfeasance or a breach of trust, causing a loss to the assets of the company, and if therefore there is some act or omission on the part of the auditors which, having regard to the provisions of art. 150 in the present case, or to a similar article in any other case, does not give rise to any liability to the company, then in my opinion it gives rise to no liability under s. 215. I think that is made perfectly plain, especially by the speech of Lord Macnaghten in *Cavendish Bentinck* v. *Fenn.* (1) I need not read it again, it has been read very often, and it has already been accepted as stating, and accurately stating, what was the settled law with regard to the construction of the section corresponding to s. 215 of the present Act. It seems to me, therefore, that art. 150 has such effect as, according to its true construction, it ought to have on the obligations and liabilities of the auditors, and that Romer J. was quite right in the conclusion at which he arrived in that respect.

That being the true construction and the actual effect of art. 150 was there anything which the auditors in the present case either did, or omitted to do, which was such an act or omission, wilful default or neglect on their part? I do not propose to go through the evidence upon that point. It is enough for me to read what Romer J. says and to say that I thoroughly agree with his conclusion. He says: "I have heard Mr. Lepine's evidence in the witness box, and I have inspected many of the numerous documents prepared by him for the purposes of the audits which he conducted. I am convinced that throughout the audits that he conducted he honestly and carefully discharged what he conceived to be the whole of his duty to the company. If in certain matters he fell short of his real duty it was because, in all good faith, he held a mistaken belief as to what that duty was." It seems to me that, agreeing with that view, I must agree with the conclusion at which Romer J. has arrived, that the application of the Official Receiver against the auditors fails.

(1) 12 App. Cas. 652.

I only desire to add this. Romer J. came to the conclusion that, but for art. 150, he would have held, and did hold, that there was negligence on the part of the auditors in regard to the inspection of the securities which were, in fact, in the possession, or ought to have been in the possession of Ellis & Co., and as to which that firm gave a certificate which was accepted by the auditors. With regard to that, I will only say this: We have not heard Mr. Stuart Bevan on that point, and it is at least arguable, I will not say more than that, that in the particular circumstances of the present case there was not, in fact, negligence on the part of the auditors, even without reference to art. 150. I do not say that I differ from Romer J., I only think it fair to Mr. Lepine to say that, Mr. Stuart Bevan not having been heard on that point, the matter is one which is at least worthy of argument.

On the whole, therefore, I agree that the appeal must be dismissed with costs.

SARGANT L.J. I will examine the questions here in a different order from that in which they were presented to us. I will take first the question whether the terms of art. 150 are effective to limit or restrict the extent of the prima facie liability of the auditors. As to this the decisions in *Coventry and Dixon's Case* (1) and *Cavendish Bentinck* v. *Fenn* (2) conclusively established that s. 215 of the Companies (Consolidation) Act, 1908, which corresponds in almost precise words with the old s. 165 of the Act of 1862, is a procedure section only, and merely provides a summary remedy for enforcing in the liquidation of a company such liabilities as might have been enforced by the company itself, or by its liquidator, by means of an ordinary action. It is not immaterial to observe that in view of the fact that this principle had been clearly laid down in the Court of Appeal in the year 1880 with reference to s. 165 of the Companies Act, 1862, the provisions of that section with no substantial change are re-enacted by s. 215 of the Companies

(1) 14 Ch. D. 660. (2) 12 App. Cas. 652:

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(Consolidation) Act, 1908. In so re-enacting this section it is impossible to suppose that the Legislature meant to give to the re-enacted section a meaning different from that so authoritatively attributed to the similar section which it replaced.

We have therefore to consider whether if the company here had brought an action against the auditors for neglect or default the defendants would have been entitled to avail themselves of the protection given to them by the article in question. I can see no reason why they should not do so. The article does not limit the nature or extent of the auditor's duties under s. 113. It is in no way contrary to the scheme of the Act, and such cases as *In re Peveril Gold Mines, Ld.* (1) and *Payne* v. *The Cork Co.* (2) seem to me to have no application whatever to this case. The article merely operates to limit the liability of the officers of the company by relieving them from the consequences of certain kinds of neglect or default. It might as well be said that a clause of this kind in trust deeds should be inoperative, because it would tend to induce trustees to be negligent of the interests of their cestuis que trust. The truth is that such restrictions on liability may, and I think often do, operate to protect rather than harm beneficiaries, because they prevent honest and responsible persons from being frightened away from accepting an office which might otherwise involve them in various unmerited and unexpected losses notwithstanding perfect honesty on their part.

That being so, we have to consider how the matter would stand if the company itself was suing the auditors, and for this purpose we must deal with the question as to what is the extent of the protection given to the auditors by reason of the latter half of art. 150. What is the meaning of the exception "wilful neglect or default" in that article? Romer J. has analysed with great care the cases on the subject, and in my opinion he has, as a result of that analysis, come to a correct conclusion. I think that

(1) [1898] 1 Ch. 122. (2) [1900] 1 Ch. 308.

the word "wilful" in this phrase is of importance, and means that the officer in question is consciously acting, or failing to act, in a reprehensible manner. It may no doubt be for him to show that this is not so, and I do not think he would be protected if he simply failed to give any consideration at all to the question of his duties, if he acted recklessly and without caring whether he was fulfilling them or not. But, in my judgment, these words excuse an officer if through mere inadvertence or error of judgment, and while endeavouring honestly to carry out his duty he does or omits to do something which apart from these words might have rendered him liable. I need not carry the definition further, for as will be seen this is enough, having regard to the view I take of the facts.

As to the facts it seems to me that there is little, if any, dispute. They have been most carefully and exhaustively stated by Romer J. in his admirable judgment, and it is unnecessary to recapitulate them. But there are two circumstances on which special stress should be laid. The first is the very great care exercised by Mr. Lepine in the performance of his duties, a circumstance to which marked attention is drawn in the judgment of the learned judge. There was obviously on the part of the auditors an honest and diligent performance of their duties to the best of their ability, and that is a fact of the utmost importance. The second is this, that in this particular case Mr. Lepine was in fact dealing with a most unusual state of things, a combination in Mr. Bevan of exceptional ability, exceptional reputation and quite exceptional roguery. Mr. Bevan had succeeded in deceiving not only all the other directors of the company, but all his numerous partners in the firm of Ellis & Co.; and he was able on behalf of Ellis & Co. to cause corroboration to be given to statements made by the company, independent corroboration by innocent persons, his own partners, although those persons had in fact derived their information from Mr. Bevan himself.

Mr. Bennett in his concise argument, none the less meritorious because of its conciseness, suggested that the

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statements in the balance sheet made a gradual and increasing divergence from the truth, and in so doing were inspired by some one in the background who was trying more and more to conceal the real state of things. I suppose he meant Mr. Bevan, or possibly Mr. Mansell. But I think that this circumstance is rather in favour of the auditors than against them. If these statements had been made on the initiative of the auditors themselves there might have been some ground for some suspicion; but when what they do is to adopt the phraseology of a rogue and fail to detect the implications arising from that phraseology, it seems to me that the circumstance that that is all they are doing is one very definitely in their favour.

Now the heads under which the auditors were sought to be rendered liable are summarised very clearly by Romer J. in his judgment. As regards the first two heads I do not propose to say anything. I only deal with the last head—namely, that connected with the leaving of the securities in the custody of the brokers. In the first place, I think that the strict rules as to trustees do not necessarily apply to limited companies in all their rigour. Trustees are dealing with other persons' property. Limited companies are dealing with their own funds. It may well be that certain companies may find it advantageous to allow brokers or agents to hold or to have free access to securities which trustees are not entitled to do. That is a matter, in my opinion, for the internal regulation of a company, having regard to the character of its business. Speaking generally, I should have thought it was inadvisable to leave marketable securities with brokers or other persons not accustomed, like bankers or safe deposit companies, to hold and keep securities as part of their ordinary business; and in any ordinary case I think it would be desirable that auditors should call attention to and require some justification for a practice of this kind. But the matter seems to me to be essentially one of degree, and one which is not regulated by the definite and strict rules which govern the conduct of trustees in such matters.

In the next place, I desire to say this, that in my opinion it would not be right that auditors should deliberately adopt a standard of verification below the ordinary standard, because the persons with whom they are dealing are persons of specially high reputation. It would be dangerous to adopt any such lower standard on account of that circumstance. But I cannot find that the auditors here did deliberately adopt any lower standard of that kind. Mr. Lepine was, in my view, adopting the standard which he thought was the proper standard, and one which was not definitely below any standard to which he was accustomed in ordinary transactions. Here I wish to express my opinion, that undue stress was laid by counsel for the appellant on the effect of the evidence of Mr. Van de Linde and Mr. Cash. They seemed to treat the practice of those persons as if it had been embodied in a written or printed code. I think that is to treat the matter altogether too rigidly, and even taking the practice of Mr. Van de Linde and Mr. Cash as they stated it before the Court, there was a considerable borderline of undefined territory, in which the auditor had to be guided by his own personal view of what was sufficient in all the circumstances of the case. In my judgment, therefore, it is impossible to treat Mr. Lepine as having gone contrary to a well defined or well recognized practice in such a way as could only have been justified in most exceptional circumstances.

I desire to add this on a matter to which Warrington L.J. has referred. I do not wish definitely to say that I agree with the view that has been taken by Romer J., that apart from art. 150 the auditors would have been liable. We have not heard on that point any argument on behalf of the auditors, and I can quite see that an argument of considerable force might be addressed to us to prevent our holding that they were neglectful or were in default apart from the special provisions of that article. But having regard to the provisions of that article, and having come to the conclusion that the very most that can be said against Mr. Lepine is that he committed an honest error of judgment, I am clearly of

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opinion that he is protected, even if he were otherwise liable, by the special and concluding words of art. 150.

Appeal dismissed.

Solicitors for the Official Receiver: *Linklaters & Paines.*

Solicitor for the respondent, The Earl of March: *Atherton Powys.*

Solicitors for the respondent, Peter Haig Thomas: *Corbould-Ellis & Mitchell.*

Solicitors for the respondent, Henry Ralph Grenside: *Lingards, Browne & Myatt.*

Solicitors for the respondent, Lord Ribblesdale: *Treherne, Higgins & Co.*

Solicitors for the respondents, Sir Douglas Dawson and David M. M. Milligan: *Downing, Middleton & Lewis.*

Solicitor for the respondent auditors, Langton & Lepine: *W. S. Pennefather* (*Stoneham & Sons*).

W. I. C.

C. A. 1923. June 18, 19, 20.

NOTE.

In re TRUSTS OF LEEDS CITY BREWERY, LIMITED'S, DEBENTURE STOCK TRUST DEED.

LEEDS CITY BREWERY, LIMITED *v.* PLATTS.

[1921. L. 2076.]

Appeal by the defendants, C. Beevers and J. A. Hirst, the trustees of the above-mentioned trust deed, from a judgment of Lawrence J.

The facts and evidence sufficiently appear from the following judgments of the Court (Lord Sterndale M.R., Warrington and Younger L.JJ.), which are copied from the transcript of the shorthand note.

Tomlin K.C. and *F. H. L. Errington* for the appellants.

Maugham K.C. and *C. A. Bennett K.C.* for the respondent company.

LORD STERNDALE M.R. This is an appeal from Lawrence J. involving an important question, because it not only involves what appears to me to be a substantial amount of money, but it involves to a certain extent a question of the character of a gentleman against whose character up to the present moment nothing has been said. The action is brought by a company called the Leeds City Brewery, Ld., against a gentleman of the name of Platts, who was their managing director, and two other gentlemen,

Mr. Beevers and Mr. Hirst, who were trustees for the debenture holders of that company. But the debenture holders of the company are not, nor are any of them, parties to the action, and the action is brought entirely by the company alone, and speaking, not technically but broadly, the action is to recover compensation or damages, whichever you like to call it, from the trustees for the debenture holders for not having acted in accordance with their duty in the purchase of a certain hotel, which was bought with the intention that it should form part of the security held by the trustees for the debenture holders.

It arises in this way. The trustees are appointed under a debenture stock trust deed. They are trustees for the debenture stockholders and they themselves have a debenture, and the debenture stock is issued secured by that debenture.

I do not think I need read any substantial part of the deed, which is I think now the common form of debenture trust deeds. It gives them a power of sale, and in cl. 18 it provides that: "At any time before the security hereby constituted becomes enforceable the trustees or trustee may upon the application and at the cost of the company do or concur in doing all or any of the things following that is to say." Then there are a number of things, the first being that they may sell, and then after specifying a number of other things, winding up with: "Generally may act in relation to the mortgaged premises in such manner as the trustees or trustee may think expedient."

Then cl. 19 provides that they are to "hold all net capital moneys arising under the last preceding clause hereof upon trust to lay out the same or any part thereof if they or he shall think fit in the construction, erection or improvement of any buildings works or erections of a fixed or permanent nature suitable for the purposes of the company and so as to constitute a permanent improvement of the remaining property of the company or in the purchase of other hereditaments suitable to be held in connection with such other property or in the purchase of machinery chatteis or effects necessary or convenient for the purposes of the company or otherwise to apply the same in such manner as the trustees or trustee may think calculated to promote the interests of the company." Then there follow some other provisions to which I need not refer.

In cl. 30 it is provided that the company shall pay to the trustees a certain remuneration that is mentioned there, and "shall at all times hereafter keep indemnified the said trustees and each of them and their and his heirs executors and administrators estates and effects from and against all actions proceedings costs charges claims and demands whatsoever which may arise or be brought or made against them or him in respect of the execution of the trusts hereof or in respect of any matter or thing done or omitted (without their or his own wilful default) with respect or relating to the premises." With regard to those words about "their or his own wilful default," I think Mr. Maugham is right in saying that they are not used in the technical way when you are speaking of taking an account on the basis of wilful default, but I think they are used as meaning, unless they have failed to do their duty purposely and wilfully, unless there is some wilful misconduct.

Clause 32 provides: "By way of supplement to the Trustee Act it is expressly declared as follows (that is to say): (1.) That the trustees or trustee may in relation to these premises act on the opinion or advice of any

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lawyer valuer surveyor broker auctioneer or other expert whether obtained by the trustees or trustee or by the company or otherwise and shall not be responsible for any loss occasioned by so acting. (2.) The trustees or trustee shall not be responsible for the consequences of any mistakes or oversight or error of judgment or forgetfulness or want of prudence on the part of the trustees or trustee or of any attorney receiver agent or other person appointed by them or him hereunder. (3.) The trustees or trustee shall as regards all the trusts powers authorities and discretions hereby vested in them or him have absolute and uncontrolled discretion as to the exercise thereof whether in relation to the manner or as to the mode of and time for the exercise thereof and in the absence of fraud they or he shall in no wise be responsible for any loss costs damages or inconvenience that may result from the exercise or non-exercise thereof."

In the view that I take of the case it is not necessary to pronounce any definite judgment upon the meaning of those clauses 30 and 32, except this, that they do seem to me to be framed for the purposes of protecting the trustees, at any rate in anything that they may do honestly, except in cases where they are wilfully acting or knowingly acting contrary to their duty. I do not think as at present advised that it was intended that if a trustee said: "Well, I know this is a thing I ought to do, or this is a thing I ought to abstain from doing, but I will abstain from doing the thing, or I will do the thing, although I know it is wrong because it gratifies me or gratifies my friends, or it brings profit or advantage in any way to me or to my friends"—I doubt whether the clause was intended to cover that. What it does cover so far as this case is concerned we can better ascertain when we find what this case is.

The facts are complicated, but I think I can state them with reasonable brevity. There was a certain property, I think it was in Bradford, which formed part of the security. It was sold, and the proceeds, somewhere about 13,000*l.*, therefore were in the hands of the trustees, for investment, and the question was how it was to be invested. I have spoken of the company, and I have spoken of the trustees, and strictly speaking that is right, but as a matter of fact the actors in this case are really a Mr. Platts, who was the managing director of the company, and Mr. Beevers, who was the only trustee who seems to have taken any part at all. The other trustee, a Mr. Hirst, seems to have left the matter in Mr. Beever's hands. Mr. Platts is a gentleman of whom perhaps his friends and associates do not think quite so much now as they did at the beginning of these transactions. At the beginning of these transactions he was the managing director of the company. He was a man whom his co-directors entirely trusted, and in whose hands they left a great deal of the management of the company. I do not mean to say they did not act at all, but they trusted him, and they acted very much on his suggestions and on his advice. As a matter of fact Mr. Platts had indulged in various speculations with regard to hotels and licensed property, and had formed and held the largest, if not the whole, interest in some companies that had been formed for working that kind of property. To what extent that was known to his co-directors I do not know. I think that probably they knew very little about it. Mr. Beevers was the auditor of the company, and he knew no doubt a great deal about the company in the sense that an auditor would know. He knew what the securities were, and all the rest of it, and he also audited the accounts of

similar brewery companies and knew something about the business in that way.

In those circumstances Mr. Platts suggested to Mr. Beevers some securities in which this sum of 13,000*l.* might be invested; and amongst others he suggested some debentures, that is to say, debentures which he held, which, of course, would be security only on the equity left after paying out those debentures. That was declined, and then Mr. Platts put before Mr. Beevers as a security proper for the trustees to hold and to buy with this sum of 13,000*l.*, or as much of it as was required, an hotel called the Queen's Hotel at Scarborough. It is on the North Cliff, which I understand is not the best part of Scarborough, it was close to the cricket ground, where I suppose people go occasionally, and so it was to a certain extent advantageously placed. It was an hotel with seventy bedrooms, and a residential hotel and not a house that could be bought for the purpose of being tied to the brewery to make a profit by selling beer. I mean it is not the ordinary sort of house that would be bought as a tied house. Mr. Platts was, I think, chairman and managing director of the company that owned that hotel, and he held much the larger part of the shares in the company. There were debentures and mortgages to the extent of about 12,000*l.* upon the hotel held by the public trustee as representing the estate of the mortgagee, whoever he may have been.

Mr. Platts put this before Mr. Beevers, and Mr. Platts before he did so represented in a letter that he wrote to Mr. Beevers that he had been by resolution authorized to deal with the matter on behalf of the company. I think it is the letter of September 29. The letter was to this effect. He writes about other matters, and then he says this: "At the same meeting I was deputed to make arrangements satisfactory to you for the investment of the funds in the debenture trustees' hands on licensed property or debentures thereon." That was not correct. He had not been authorized by any resolution at that time. I think that it is not at all improbable that the matter had been informally left in his hands a good deal, but he had not been deputed to do so at that time formally by resolution, but later on, on December 10, he was formally authorized by a resolution to do it. The resolution was this: that "the moneys standing to the credit of the debenture trustees be left in the hands of the chairman, Mr. W. H. Platts, and the debenture trustees to deal with as they think fit." That was before the matter was concluded, so that there is no question of his authority up to that point so far as that resolution gave it to him.

In the course of their negotiations and their conversations about this matter there is no doubt that Mr. Beevers was informed that Mr. Platts held a controlling interest—so Mr. Platts says: a substantial interest Mr. Beevers says—as a shareholder in the hotel. There is no doubt also that before the matter was concluded, at any rate on December 29, Mr. Beevers was informed that Mr. Platts was clearing off the mortgages and debentures which he had told Mr. Beevers at a previous interview he would attend to, by getting them into his own hands and then transferring them, or clearing the hotel from them by being paid off, and it turns out that he bought them. They were of the face value of about 12,000*l.* and he bought them for 9000*l.*

I do not think it is necessary to go into the exact way in which Mr. Platts benefited by that matter. He did not get 3000*l.*, the difference between the 9000*l.* and the 12,000*l.*, but he did get an advantage of a great deal of

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it, because he was paid out of what came to the company over and above the paying off the amount of the debenture, the 9000*l.*—he was paid about 1000*l.* for what had been owing to him by the company for management, and he also got the advantage of a sum of nearly 1700*l.* worth of unsecured debts being paid off, which it was to his benefit to have paid off, for reasons which it is not necessary for me to go into now, so that he did get a benefit from it.

The letter of December 29, which Mr. Beever said was the first intimation as to Mr. Platts having to do with the mortgages and debentures, except seeing that they were got rid of in some way, was this—I may say that Mr. Beevers had been away in America—in which he said: "During your absence I instructed Messrs. Peckover, Scriven & Co."—they were the solicitors for the Queen's Hotel Company in fact, and I think also they were the solicitors for Mr. Platts—"to prepare a short contract of sale of the Queen's Hotel, Scarborough, including furnishings and equipment for the sum of 12,000*l.* to Mr. Hirst and yourself as trustees for the debenture holders of the Leeds City Brewery. This contract will have to be signed and completed on or before December 31st, as my own contract to purchase the mortgages and debentures only expires on that date, and if not completed my deposit will be forfeited." As I have said, Mr. Beevers says that is the first intimation he had of that connection of Mr. Platts on the question of paying off the mortgages and debentures. There is no oral evidence that he had any information before that, but it is said that there ought to be inferred from this letter and from another letter, which was written about the same time, that he was informed of it before. I cannot myself see in the absence of any evidence that there is enough here to convince any one that Mr. Beevers was informed of that matter before this. At any rate it is not contended that Mr. Beevers, whatever he knew about the transaction with regard to the mortgages and debentures, had any reason to know or to think that Mr. Platts was making a profit, or putting anything into his own pocket out of it. So that the contract was signed and the matter completed not very long afterwards.

The position then at the moment was this. Mr. Beevers, dealing with Mr. Platts, who was the chairman and the trusted representative of the company, bought on behalf of the trustees from Mr. Platts this property in Scarborough, the Queen's Hotel, which has been found by the learned judge—and I see no reason whatever to differ from his finding with regard to that—not to come within the terms of the clause in the trust deed which I have already read, cl. 19 I think it is, as being property suitable to be held in connection with other property of the company. I see no reason to doubt that. He had bought that knowing that Mr. Platts had a controlling interest as a shareholder in the company. He had bought it knowing, either at an early or late date—I do not think it matters which, because it was before the contract was signed—that Mr. Platts was getting rid of the mortgages and debentures by buying them himself and then reselling them.

It is said that in that state of things Mr. Beevers ought not to have gone on with and concluded this transaction without making further inquiries as to whether Mr. Platts' co-directors approved of a transfer to the company of the property in which Mr. Platts had so great an interest, and that he ought not to have gone on with it without an independent valuation of the property. The only valuation that he had of the property was a valuation

which he asked Mr. Platts to get, and which was got as a matter of fact by Mr. Morgan, who was Mr. Platts' partner. It is said for Mr. Beevers, that considering the position in which Mr. Platts was put, and considering the reputation that Mr. Platts held, and the trust that was reposed in Mr. Platts by the other trustees, there was nothing at all wrong in going on with the matter and concluding it without further inquiries. Well, personally I cannot accept that position. I think that Mr. Beevers, when it came to his knowledge that Mr. Platts had the interest which I have mentioned, and was acting in the way that he was acting with regard to the property, which was being bought by the trustees for the benefit of the company and the debenture holders, ought to have made further inquiries and to have ascertained more about this property, which was in fact not suitable to be held with the other property of the company, and that he was not acting with ordinary care and diligence in proceeding in the way that he did without making any further inquiries. I do not think that a trustee, acting as Mr. Beevers was, is really—looking at it as a matter of business, or looking at it as a matter of trusteeship—justified in going on in circumstances of this kind without making further inquiries than he did to see whether it was all right that the managing director of the company should be selling to the company, perhaps I ought not to say selling, but negotiating the sale to the company of property in which he had such a great interest, without finding out whether the persons who had the management of the company, apart from the managing director, assented to such a transaction. I assume there were powers in the articles for a director in proper circumstances to enter into such a transaction, but I think it was Mr. Beevers' duty to have ascertained whether the thing was all right or not in those circumstances, and it is perhaps more so where, on the face of it, the property would not seem to be what is called a brewery company's property, especially a Leeds brewery property, because it was a residential hotel situated in a town seventy miles from Leeds, and was, therefore, not prima facie the sort of property that a brewery would be investing in. I think it was too much to say, as was said by the learned counsel for the respondents, that that of itself ought to have told Mr. Beevers that there was something wrong about the transaction. I think that is going too far, because, looking at Mr. Beevers' evidence, I find he says he audits other brewery companies' accounts, and he finds from experience that brewery companies do in fact buy and hold properties analogous to this, that is to say, properties that are not houses simply for the consumption of beer, but are something more than that, and yet are some distance away from the brewery company which buys them. Still it was an additional circumstance which I think, coupled with the other matters to which I have alluded, ought to have led him to make further inquiries before he allowed the matter to go through.

But that does not to my mind in any way conclude the matter, because it does seem to me that that is a matter which is covered by the clauses, one or other of which I have read. I take it that the company could not sue Mr. Beevers for a matter against which they had undertaken to indemnify him, and therefore it might—I do not say it does, but it might—come within cl. 30, and he might be protected by that clause, unless it was done by his own wilful default. But it seems to me to come within sub-s. 2 of cl. 32, which provides that "The trustees or trustee shall not be responsible for the consequences of any mistake or oversight or error of judgment or

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forgetfulness or want of prudence on the part of the trustees or trustee"—it does not use the word "negligence." The clause I am told is a clause which was settled a good many years ago, and settled by very eminent persons, and I think, looking at the clause as drafted, the intention was, and I think the meaning is, to protect the trustees from bona fide negligent acts, if I may so call them, that is to say, their omissions of duty done in the honest discharge of their duty, or rather I will not say the honest discharge, but done honestly in exercising the powers which are given to them, and I think it has been intended to include what one often sums up shortly as negligence, by setting out a number of things which would be considered negligence, without using the word which might frighten people who had to deal with trustees under these deeds. In the course of the argument I mentioned the analogy of clauses in charterparties. Very often the whole thing covering several lines of print might be summed up by saying, "the shipowners shall not be responsible for anything," but if you put that on the face of the bill it would frighten people, and therefore you put a great number of clauses which really come to that when you read them, and I think that is the way in which this sub-cl. 2 of cl. 32 should be read. I think it means shortly, that if they had omitted to discharge their duty properly they shall not be responsible, but as I have said before I do not think it is meant to cover a wilful doing wrong.

Therefore the question to my mind which has to be decided to settle this appeal is whether Mr. Beevers was to be held to have done this wilfully and intentionally knowing that what he was doing was wrong. The learned judge has found that he did. It was wilful neglect, as he calls it, which I take to mean wilfully doing what was wrong, and wilfully doing what he knew it was his duty not to do, or not doing what he knew it was his duty to do. I am sorry to say I cannot agree with the learned judge. I do not think there is sufficient evidence to show that. One cannot overlook the position of Mr. Platts in his company, the reputation of Mr. Platts at that time with his co-directors and the trustees and everybody with whom he had to deal, and one cannot overlook the trust that was put in Mr. Platts by the resolution which I have read. It is said that that only means that he was to negotiate and then come back to the other directors for confirmation. Well that may be what they meant. They certainly did not tell Mr. Beevers so, and I do not know that Mr. Beevers, subject to a matter which I will deal with a little later, had any reason to know that they were not cognisant of and assenting to all that Mr. Platts was doing.

And another thing which impresses me a good deal is this. A man like Mr. Beevers, and a man who as I say is in a good position, and against whom not a word has been said before this, does not as a rule do a thing which he knows to be wrong deliberately and purposely without any object at all, and I am wholly at a loss to find any object which Mr. Beevers could have had in knowingly doing what was wrong in this matter and purposely abstaining from making inquiries, because he knew that if he did make inquiries it might upset the whole thing. I have not heard any such motive suggested, except that Mr. Platts was his friend. I do not see any evidence that Mr. Platts was more his friend than the other directors were his friends. I do not see any evidence of any special friendship with Mr. Platts, and after all supposing he were a friend of Mr. Platts, a respectable man does not generally do a dishonourable thing because his friend wants him to do

it, and it does not seem to me, even if Mr. Platts were his friend, that that supplies anything like sufficient motive; and as I have said I cannot see any evidence at all suggesting any motive or any reason why Mr. Beevers, with the knowledge that he ought not to go on with this matter, should have deliberately gone on with it. I can see reasons why he should—I am not a business man—in my opinion improperly and carelessly have gone on trusting too much to Mr. Platts. I can see many reasons for that, but I cannot see any reason for his having done it wilfully and improperly in that sense. But there are two matters, and oddly enough they are two matters upon which the learned judge did not found his judgment, but to which he only alluded as supporting it, which seem to me to be the only two matters on which a finding of intentional wrongdoing could be supported, and those are, first of all, an interview with the secretary, Mr. Weatherill, and what was said at that interview. Mr. Weatherill says in effect this. He says that he went to see Mr. Beevers because there was a question of whether this 13,000*l.* or a portion of it should be taken to satisfy a claim that the Government had for excess profits duty, and that Mr. Beevers, after hesitating as he says a little, said: "Well, the fact is you know it has gone, it is earmarked." Mr. Weatherill said—these are the exact words: "Then he kind of hesitated, and turned halfway round in this way and said: 'As a matter of fact the money is not there, it has been invested by Mr. Platts and the trustees.' I said: 'Well, neither I nor my directors know anything whatever about it'; and he said: 'Well, if they do not know do not tell them.' I said: 'Very well, if you do not want me to say so, Mr. Beevers, I will not.' 'No,' he said, 'do not tell them, you will get to know in a few days'; and I said: 'Very well, Mr. Beevers.' At this stage I might say that Mr. Beevers has audited my company's books for the last twenty-six years, and we were very good friends and I have the utmost faith in his integrity, and I said: 'Very well, if you do not want me to say anything just now I will not.'" That is Mr. Weatherill's account. Mr. Beevers' account, on the other hand, is that this was what took place. "Then I said to him"—that is Mr. Weatherill—'As a matter of fact the money has already been dealt with.' He seemed very surprised, and he said: 'I suppose Mr. Platts has the matter in hand?—they both agree that Mr. Platts' name was mentioned as being the person who had done it—so I said 'Yes,' and then he said: 'Well, if he has it in hand I shall know nothing about it, I shall say nothing about it to anybody.'" Then he is asked if he said: "If the directors do not know, do not say anything to them about it"; and he says: "No, not at all; I never said such a thing." And he also says Mr. Weatherill did not say anything about the directors. I think we must take it that the learned judge has accepted Mr. Weatherill's account in substance, at any rate I think he does, although he does not say so in so many words.

But the first thing that strikes me about the matter is this, that whatever was said, and assuming Mr. Weatherill's account to be correct, it does not seem to have occurred to Mr. Weatherill's mind at all that there was anything curious or wrong or improper about what Mr. Beevers had said. Mr. Weatherill is a trusted servant of the company, the secretary of the company, and if he had, I cannot see how he could possibly have refrained from going off at once and saying to the directors: "Here is something going on wrong, Beevers told me not to say anything to you about it, but

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I thought you ought to know, and here is the whole matter: the money has been invested in something that Mr. Platts has presented to him." That is the first thing that strikes one. But Mr. Weatherill did not think there was anything wrong in what was said, and it is only when he comes to give evidence, months afterwards, that it strikes him that that was a very suspicious thing. It did not strike him as suspicious at the moment, and it seems to me that the mention of Mr. Platts' name, and the two accounts taken together, are quite consistent with this, that whatever Mr. Beevers said about not telling them was because it was in Mr. Platts' hands, and as Mr. Weatherill himself said: "If you do not want me to say anything just now I will not," and that it being in Mr. Platts' hands the other directors were not to be brought into it. It was a foolish thing to say if he did say that, but I cannot see that that of itself, or coupled with the other facts which I have mentioned, is enough to show that Beevers knew that what he was doing was wrong, and deliberately did wrong.

The other matter was a letter that was written by Mr. Beevers, and I think it was on July 5. About that time or before that time the whole trouble had begun. I think a good deal more had been learned about Mr. Platts and his transactions than had been known at the time of this matter going on. As a matter of fact the writ was issued only six days afterwards, and Mr. Beevers had been attacked for what he had done in this matter. I need not go into the details of how he had been attacked. I do not mean to say he was improperly attacked, but what he had done had been questioned by the company, so much so that the writ was issued only six days afterwards, and he wrote, "In reply to your letter of the 30th ult."—it is a letter written to Messrs. Ford & Warren, who are the solicitors for the Leeds City Brewery Company. They had written saying: "Our clients feel very strongly that the facts and circumstances attending the purchase call for explanation and they are anxious to know the reason which led to the trustees purchasing an hotel so unsuitable for the purpose of the brewery company as the Queen's Hotel Hydro, Scarborough, seems to be." In answer to that letter Mr. Beevers wrote this on July 5: "In reply to your letter of the 30th ult., according to the trustees' information Mr. Platts was deputed by the directors to arrange for the investment of moneys lying to the credit of the trustees for debenture holders. In consequence, the latter, acting under legal advice, agreed to the purchase of the Queen's Hotel, Scarborough." That alludes to a matter which I have not thought it necessary to mention before, that Mr. Beevers took the advice of Messrs. North & Sons, who are solicitors of high standing, on the matter, but their advice was that it was a proper investment within the powers of the investment deed. What they were told, and what were the facts upon which their opinion was asked we do not know, and I should think they were advising simply upon the legal point, and they would very likely not be competent—at any rate not necessarily competent—to say whether it was a suitable property or not. It may be that they were told: "Assuming this is a suitable property is it a thing that can be done within the powers of the trust deed?" and, therefore, I personally do not attach any importance to that legal advice. I have not mentioned it before, but it is necessary to mention it now to explain this letter. The letter goes on: "Previous to the purchase a valuation was made by Harland & Son of Scarborough copy of which we enclose herewith"—they valued the property I think at 12,000*l.*, the hotel

with the furniture—"Mr. Platts informed the trustees in a letter dated 5th February last that the East Coast Hotels Company, Ld., are the tenants of the Queen's Hotel at a rental of 600*l.* per annum. The only information the trustees have of the interest of Mr. Platts in the property is contained in a letter to Mr. H. Nickols" (who was one of the other directors of the company) "dated 2nd February last a copy of which letter was furnished to us by Mr. Platts subsequent to the purchase."

Mr. Beevers was not unnaturally cross-examined about that letter, and what he says is that he meant the company to understand by that letter that he did not know at that time—at any rate before he got that letter—precisely what the interest of Mr. Platts was, and that he did not mean to convey that he knew nothing about Mr. Platts having an interest till he got that letter. Well, I am bound to say with regret, that that explanation does not satisfy me at all. I do not think that it was denied that anybody reading this letter might very well come to the conclusion that Mr. Beevers was saying he did not know of any interest before that, but Mr. Beevers in effect says: "Of course it would have been better if I had worded it some other way, but I did not mean to convey that." With regret, I say, I confess I am not satisfied about that. I am inclined to think the intention of this letter was that these gentlemen, the other directors of the company, should think that these trustees had no information before that letter was received as to Mr. Platts' interest. But that seems to me to be a very long way from saying that Mr. Beevers, several months before, was deliberately doing what he knew was wrong, I suppose for the pleasure of satisfying Mr. Platts, or with the object of satisfying Mr. Platts—with no other object suggested. I think I should look at it as being the letter of a man who should not have written—and I think as Lawrence J. says, who probably now regrets having written—who finding himself in this difficulty was trying to make the best case he could for himself and went too far in the statement that he made, or in writing something from which a wrong inference might be drawn. To a great extent I agree with what the learned judge says about that letter. But it does not seem to me to show that months before, before any trouble had arisen, Mr. Beevers was deliberately violating his duty for the pleasure of gratifying Mr. Platts, and why he should have gratified Mr. Platts I really cannot see, and therefore I think that the necessary factor to make Mr. Beevers liable here—namely, that what he did was wilful in the sense that he knew he was doing what was wrong, or knew what he was going to do was a wrong thing, and deliberately did it—is wanting, and therefore that he has done nothing for which he is not covered by the terms of the trust deed, and that the plaintiffs cannot establish any claim against him.

I ought to say that if I were of a different opinion on this part of it, there might be very difficult questions arising, first, as to the plaintiffs' right to maintain this action at all, and, secondly, their right to maintain this action in the absence of the debenture holders, who are cestui que trusts under the trust deed. I express no opinion at all on those questions, because in the view I take of the facts it is not necessary.

I have dealt only with Mr. Beevers, because it was admitted that the judgment against Mr. Hirst could not be upheld, and therefore I think the result of it is, for the reasons I have given, that the action must be dismissed with costs both here and below.

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WARRINGTON L.J. I am of the same opinion. This is an action brought by a limited company against the trustees of a debenture trust deed seeking to recover from those trustees damages for an alleged breach of trust. The learned judge has found that the trustees did commit a breach of trust, and that they were responsible to the company for the consequences of it, and has pronounced a judgment accordingly.

The trustees appealed. The appellants raised first a point of law, which was of this nature. They said the action is one brought by a mortgagor against a mortgagee claiming that the mortgagee in the exercise of the powers conferred upon him by the mortgage has inflicted loss upon the mortgagor and must make good that loss. And further that according to the well-known principles governing in a Court of equity the law of mortgagor and mortgagee, the mortgagor cannot attack a mortgagee without at the same time submitting to a decree for redemption, which of course if not complied with would result in a foreclosure. It is said further that even if that is not the true view, and that the company can sue these trustees, not as their mortgagees, but as trustees for them, that they can at all events—they must at all events in such an action make parties the debenture stockholders, who are at any rate as much interested as they are in the due execution of the trusts.

Now on neither of these points do I propose to pronounce any judgment, because for reasons which I will state shortly presently I think the action fails on grounds substantially identical with those which have been stated by the Master of the Rolls. But I will only say this, that as at present advised, and without having heard Mr. Tomlin or Mr. Errington in reply, I am not satisfied at present that a deed of the nature of this trust deed is to be treated altogether as merely a mortgage in the form of a trust for sale. With regard to these debenture deeds it may well be—and I desire to leave the point entirely open on that—that the principles of equity which may be applicable to the simple case of a mortgagor and mortgagee, and that notwithstanding that the mortgage took the form of a trust for sale, may not be applicable to these debenture trust deeds, which are a great deal more than merely a mortgage or a trust equivalent to a mortgage. So also with regard to the absence of the parties. I am inclined to think here that this action, or at any rate the relief which was sought to be obtained in the action, would not have been obtained without making the debenture holders parties. But I do not rest my judgment upon that.

Then there comes this point taken by the trustees. The trustees say: You the company entrusted your managing director, in whom you presumably had full confidence, and in whom Mr. Beevers the acting trustee certainly had full confidence, with the duty of settling with the trustees the mode of investment of the money which was in their hands, and it was Mr. Platts who brought to the trustees and got them to accept the property which you now say is unsuitable property and not within the terms of the deed; and that as you the company have yourselves, through Mr. Platts, brought about the investment of the trust funds in this property, you cannot now claim against the trustees as having been guilty of a breach of trust.

Prima facie thus stated I think that would be a complete answer to the company's claim. But it is said that Mr. Beevers was not justified in accepting Mr. Platts' authority, and accepting this security brought to him by Mr. Platts, because he knew of certain circumstances which ought in

his mind to have displaced the authority which Mr. Platts had received from the company, and ought to have prevented him from acting upon it without making further inquiries, and it is on that point that the case requires some careful consideration.

The position was this. Mr. Platts was managing director of the company. Everybody with whom he was concerned appears to have had the utmost confidence in his integrity. At the outset of the transaction on September 29, 1920, Mr. Platts told Mr. Beevers that at a directors' meeting, to be quite correct, he, Mr. Platts, was deputed to make arrangements satisfactory to the trustees for the investment of the funds in the debenture trustees' hands on licensed property or debentures thereon. That was not true. He had not, at any meeting of the directors at all events, received any such authority, but Mr. Beevers had no reason to suppose it was not true, and as a matter of fact before the agreement for the purchase was made the directors had given the fullest authority in a formal resolution in these terms, that the moneys standing to the credit of the debenture trustees be left in the hands of the chairman, Mr. W. H. Platts, and the debenture trustees to deal with as they think fit.

There is one remarkable fact about that resolution. That was passed on December 10, 1920. When the minutes of December 10 came up for confirmation, on February 15, it was found that that particular resolution had not been inserted in the minutes. The directors agreed that that was an omission, and agreed then that a minute of that resolution should be inserted before confirmation, and that was done. It is a most remarkable thing. It was at that meeting of February 15 that the fact that the other two directors, Mr. Nickols and Mr. Wright, protested against the purchase of this Queen's Hotel was discussed, and notwithstanding that they had then raised their objection to this purchase they consented to have it inserted, and they did that when they passed that previous resolution and consented to have a record made of it. However, there it is, and that resolution certainly gave to Mr. Platts, and was certainly intended to give to Mr. Platts, the fullest power to settle with the trustees the mode of this investment. The investment was accordingly made.

I turn to the question, having regard to that authority of Mr. Platts, as to the position of Mr. Beevers. At first Mr. Beevers knew only that Mr. Platts was a considerable shareholder in the company. He also had been told by Mr. Platts that the hotel which was offered to the trustees was subject to a mortgage and subject to some debentures, and that he, Mr. Platts, would see to those. That means, I suppose, that as the sale which was to be made to the trustees must be free from incumbrances, Mr. Platts would take care that those incumbrances were discharged. That is all that Mr. Beevers knew at that time, and he knew no more until after he returned from his absence in the United States of America, which absence commenced, I think, about some time in the middle of November—I think he left on November 13, and he came back towards the end of December. He was then told that the way in which Mr. Platts had attended to the matter of the mortgage and the debentures was that he had entered into a contract himself to take them over. But there is no evidence that Mr. Beevers knew at that time the terms of the arrangement made by Mr. Platts, and in fact it is admitted on the part of the company that Mr. Beevers did not know. What he did know, and all that he knew material to this question was, that

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Mr. Platts was largely interested in the company, which was the nominal vendor. He knew that, he knew that he was interested in it as a shareholder, and he knew that at the time of the completion he would be interested in it as an actual incumbrancer. That was all he knew. The learned judge has found that Mr. Beevers wilfully committed a breach of trust in abstaining under those circumstances from refusing to go on with the transaction without making some further inquiries—I suppose as to the views of the co-directors as to the suitability of this house—or without taking some further steps to obtain a valuation. He has found that he wilfully committed that breach of trust, consisting in wilful neglect of his duty and failure to perform his duty, which as a trustee prima facie he was bound to perform.

Mr. Beevers, the appellant, relies on a provision of the trust deed that "the trustees or trustee shall not be responsible for the consequences of any mistake or oversight or error of judgment or forgetfulness or want of prudence on the part of the trustees or trustee or of any attorney receiver or other person appointed by them or him hereunder."

The learned judge, and here I agree with his view, has held that assuming that the trustee was guilty of wilful breach of trust, he would not be protected by that clause. I am inclined to agree with him there. But then it becomes important to consider what is meant by a wilful breach of trust or wilful negligence or wilful failure to perform his duty. I think it means this. I think it means deliberately and purposely doing something which he knows, when he does it, is a breach of trust, consisting in a failure to perform his duty as trustee.

Can Mr. Beevers be held to have deliberately and purposely committed a breach of trust, knowing that he was doing that which was wrong under circumstances which I have stated? The learned judge has in terms acquitted him of anything like dishonesty, and I should go further, I think, to say that so far as our attention has been called to the evidence, there is no evidence whatever of any improper motive actuating Mr. Beevers which would not be, perhaps, covered by a narrow interpretation of the word "dishonest." It is suggested that Mr. Beevers did what he did because he was a friend of Mr. Platts. There does not appear to be any evidence whatever that he was a friend of Mr. Platts, to this extent, that he was in any way under his influence or under any obligation, or likely to do that which he knew to be wrong, in deference to the wishes of his friend, and from no conceivable reason affecting himself. I think the only conclusion that we can draw from the circumstances of this case, and the evidence which was given, was that he did what he did because he believed that this property, having been brought to him by Mr. Platts as a property which the company desired and properly asked to have the money invested in, it was right that he should accept this position, that he was entitled to rely, as he did rely, in common with the directors of the company who had entrusted Mr. Platts with this authority, on Mr. Platts' integrity, and not only on that, but in Mr. Platts doing what he did as a prudent and wise thing to be done in dealing with the moneys in the hands of the trustees. What he did was, I think, unquestionably imprudent, and imprudent to an extent which I am surprised to find displayed by a gentleman in Mr. Beevers' position and of his experience, but I think we cannot go further than saying that it was imprudent and imprudent to a high degree, but if it was merely imprudent, and not such as could properly be described as a wilful breach

of trust, it could be covered by the clause in the trust deed to which I have already referred.

The foundation of my judgment is that Mr. Beevers acted on and accepted the position of Mr. Platts, which had been conferred upon him by his co-directors, and that in accepting and acting on that without making further inquiries, he was upon the whole of the circumstances guilty merely of imprudence, which was covered by the deed—and not wilful neglect or wilful breach of trust, which in my view would not be covered by the deed.

With regard to the two circumstances referred to by the Master of the Rolls, the interview with Mr. Weatherill, and the letter of July, the Master of the Rolls has said what is to be said about that. I have nothing to add except that I accept his views completely. The result is, on the whole, that in my opinion the judgment of the learned judge was wrong and must be discharged, and there will be judgment for the defendants Beevers and Hirst, with costs here and below.

YOUNGER L.J. I am of the same opinion. If it had been made as plain to the learned judge in the Court below as it has been made plain to us, that this is an action brought by the company, and by the company alone, against these two trustees under this debenture stock trust deed, it would have been made more plain to him than I think it was, that the whole position had to be regarded from a particular angle affecting prejudicially the claim of the company against its trustees in a way that perhaps a similar claim by debenture stockholders against them would not have been affected. It would further have been made plain, as was recognized by Mr. Maugham in his argument before us, that the only case which the company is able even to present against these defendants as the trustees for the debenture stockholders is one which cannot for a moment be sustained against Mr. Hirst, and that the action against him, when the facts of the case are recognized and understood, has been, I might say, hopeless from the first.

From the way in which the case was presented in the Court below that which appears to me to be the cardinal feature of it was entirely lost sight of, and that was the position in which Mr. Platts was placed by this company through its board of directors in the negotiations, in which he was appointed to represent them, with the trustees of the debenture holders' trust deed. For the purpose of dealing with the moneys in their hands awaiting investment, Platts was, we are told, the moving spirit of the company. He held a large number of shares. He had guaranteed the bank overdraft, and he was the managing director of the company. His position was one apparently of almost unlimited control. He was trusted by his co-directors to an extent which is unusual and rare. "I had perfect confidence in Mr. Platts," says Mr. Nickols in his evidence "I would have trusted him with anything."

And at a later stage he said, "He was the leading spirit of the board."

The defendant, Mr. Beevers, or his firm had been the auditors of this company for many years, and in the course of proceedings in the Court below, in a passage to which Mr. Errington called our attention this morning, the learned judge indicated to Mr. Owen Thompson, who was arguing the case, that he might well take it that Mr. Platts' co-directors well understood and recognized that Mr. Beevers would have in Mr. Platts the same confidence and repose in him the same trust that his co-directors did when they empowered him to negotiate this matter with the trustees.

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It was so armed with that authority that Mr. Platts did approach Mr. Beevers in reference to this matter, first of all in the letter which he wrote on September 27, 1920, and in which he sets forth the two propositions which he desired the trustees to consider for the investment of these moneys in their hands awaiting investment. The first of them was the Queen's Hotel, Scarborough, and Vaults, over which the discussion has subsequently raged, and the second of them were certain debentures in the Royal Hotel, Whitby, which in this letter Mr. Platts introduces as follows: "Alternatively, I suggest you purchase 15,000*l.* 6 per cent. free of income tax debentures in the Royal Hotel, Whitby, for which there is 75,000*l.* security and very substantial profits, which debentures are at present held by me personally, and can be conveyed by simple transfer, and part of the arrangement would be to tie the hotel to the Leeds City Brewery for wine spirits beer and tobacco." Whether consciously or unconsciously at the date when Mr. Platts wrote that letter he placed before Mr. Beevers these two propositions with a definite statement as to one of them that the debentures which the trustees would purchase were his personal property, but that the effect of the purchase so far as the brewery company was concerned was that as soon as the trustees had become possessed of those debentures the company would have the benefit of a tie upon the hotel which had issued them. And having so described these two propositions of one or the other of which he invited their acceptance, he on September 29 sent this further letter to Mr. Beevers, with the paragraph at the end which has been so much commented upon: "At the same meeting"—he means by that a meeting of the directors, although it is not very clearly stated in the earlier part of the letter that he does so mean it—"I was deputed to make arrangements satisfactory to you for the investment of the funds in the debenture trustees' hands on licensed property or debentures thereon." Whether again consciously or not I do not know, but if those two statements in these two letters were made consciously by Mr. Platts to Mr. Beevers I cannot imagine any more subtle or yet more convincing method of explaining plainly to Mr. Beevers that when he had obtained from the board authority to arrange with him for the investment of the funds on debentures in licensed property, he had obtained authority to arrange for the investment of these funds on debentures which were his own property in respect of which a tie would be received by the company when the transaction was complete. It is therefore in that frame of mind that this representative of the company, so completely and entirely trusted by everybody in relation to it, approached the trustees for the debenture stockholders with a view of negotiating the investment of these funds. It is true that on September 29, 1920, when that letter was written by Mr. Platts he had no such authority as he there represented. There had been, so far as the evidence goes, no meeting of the board at which any such authority had been given, and to put it bluntly in making that statement to Mr. Beevers he said something which was in fact untrue, which possibly may only be justified in his mind by the predominant position which he occupied in this company, and by the assurance that he may have himself felt that anything that he proposed to his co-directors and enforced by his own personality would, either with or without a struggle, be accepted by them. Anyhow it was not in any way suggested that Mr. Beevers was conscious in any way of an inaccuracy of statement in that respect by Mr. Platts' and, as my Lord and the Lord Justice have pointed out, the authority to

deal with Mr. Beevers in relation to this matter was subsequently formally conferred upon Mr. Platts by the resolution of the board of the company on December 10, 1920.

The negotiation was commenced or carried through, and after various reports and some advice the trustees for the debenture holders agreed to purchase this hotel and pay for it the price which was subsequently agreed to. I said, I think early yesterday, that if that were the whole case, however unsuitable this hotel was for the purpose of this business, however inappropriate it was for an investment of the debenture stockholders' trust funds, there was not, and could not be in view of the terms of this deed, a shadow of a case against these trustees for entering into this transaction, in an action in which the company is plaintiff. For here you have the representative of the company representing to the trustees and inviting the trustees to accept and take as part of the security this property selected by him for the purpose. It is unthinkable that after that attitude had been adopted by the representative of the company the company could turn round and say: "You have committed a breach of trust by accepting this property which, under the terms of the trust deed, it was beyond your power to entertain." If, therefore, the matter stopped there, as I said yesterday, and as I still say, the action at the instance of the company against these defendants would not have a shadow of substance. But it is suggested that the action can be maintained by reason of information which, it is said, must be imputed to Mr. Beevers, as communicated to him in the course of the transaction and before the purchase was completed, and that information was information which ought to have led him to see that Mr. Platts was making a personal profit for himself out of this transaction at the expense of the brewery company, and that accordingly Mr. Beevers should have recognized that he could no longer treat with Mr. Platts as the company's representative in such a transaction, and that it was his duty to appeal, if I may use the expression, to headquarters and obtain the authority of the ultimate governing body of the company on its behalf to the transaction which the trustees were asked to accept.

In connection with that, it is well to inquire what are the suggestions or allegations, or what is the position which the company in this action suggest was occupied by Mr. Beevers in relation to what I might call his integrity or his bona fides. First of all, Mr. Beevers was, at nearly the conclusion of his evidence, accepted in the Court below not only by the learned judge, but by Mr. Patrick Hastings, who appeared on behalf of the company, as an honest witness. Secondly, it is not even now suggested that Mr. Beevers knew, or I think one might even say, had any real suspicion that out of this transaction Mr. Platts was going to make for himself any profit at all; and the third thing which is found by the learned judge in his judgment, and which I think appears from all the circumstances of the case when they are fairly and properly regarded, was that it cannot be said that at any stage of this transaction Mr. Beevers intended or believed that he was committing any breach of trust at all.

Having said so much, what was it that Mr. Beevers, on his evidence—the evidence of an honest witness—was told or might have gathered from the course of the transaction between Mr. Platts and himself? It was this: that Mr. Platts was a shareholder with either a very large, or if you like a predominant interest in this hotel company whose hotel was going to be

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purchased. He was also, however, informed that the financial position of that company was such that no advantage of any sort or kind could be expected to be derived by any shareholder in it in respect of the transaction if it went through. The next thing that Mr. Beevers knew or may be taken to have known was that Mr. Platts was negotiating for the acquisition before completion of the purchase of outstanding mortgages and debentures on the property which was going to be purchased, to the intent that that property might be handed over to the trustees when the purchase price was paid as a property free from incumbrances. But it was not made plain to Mr. Beevers, nor did Mr. Beevers understand, that in respect of the transaction for the taking over of that mortgage and all these debentures Mr. Platts was going to secure for himself, if he did in truth secure it, any profit at all. Further, Mr. Platts represented to Mr. Beevers, probably truthfully, and Mr. Beevers plainly believed, that as the result of the whole of his dealings with this company which possessed the hotel which the trustees were to acquire, and as a result of this purchase which the trustees were recommended to make, Mr. Platts would be a loser on the transaction.

We find Mr. Beevers dealing with this honest man, believed to be an honest man, held in the highest esteem by all persons with whom he was concerned, interested to this large extent in the company which was going, subject to the debenture stock trustees, to become the owners of this property, recommending its purchase on terms which would leave him, Mr. Platts, personally a loser on the transaction; and on those statements—Mr. Beevers—his suspicions never aroused, but if aroused, they, to some extent and perhaps the whole extent, might well have been wrong—went on in this transaction in the belief that there was no personal interest in the form of profit secured by Mr. Platts out of it at all, and went on with it on terms which might well suggest to his mind that as a business transaction in which Mr. Platts was concerned—as far as his interest in the hotel was concerned—that Platts, the controlling spirit of the brewery company, was, to his own despite, recommending a transaction which would be ultimately for the benefit of that company itself.

Mr. Beevers accepted these statements of Mr. Platts, and he concluded this transaction, and concluded it after having had a valuation showing that the price paid was far from excessive, because it was less than the valuation price, and after having taken some advice from his solicitors as to the propriety in other respects of the transaction. It is said that he is to be made responsible by reason of the fact that he ought to have known, if he did not know, that the transaction was entirely different from what was represented to him, and that, as it was put, it was one engineered by Mr. Platts for his own advantage to relieve him or the hotel company from embarrassments into which it had fallen, and from which he desired to be relieved in order that his own personal credit in Scarborough might be maintained.

In my opinion that is not the conclusion which is to be drawn from all the facts of the case. The conclusion which is to be drawn from all the facts of the case, as I have stated them, appears to me to be clearly this, that if Mr. Beevers has been wrong or guilty of anything in relation to this matter, it has been from what in the deed is called a want of prudence, and that that want of prudence has been manifested in the fact that he too lightly and without proper reserve accepted at their face value the words of a man who by the directors of the company itself would have been trusted

with anything. In these circumstances I do not have to strain the words of this deed in order to relieve Mr. Beevers from liability. If these be the facts of the case, those words "want of prudence" describe what happened with accuracy and aptness, and such a mistake as Mr. Beevers did make, if I have stated the facts correctly, is just such a mistake as a debenture stock trustee would properly and in advance stipulate to be protected against, in the event of his falling into it in the course of his duties as a trustee.

Therefore I agree with my Lord and the Lord Justice that on that short point, and on that short ground, this action fails as against Mr. Beevers just as it has failed against Mr. Hirst, and it is therefore unnecessary for me to go further and consider the more difficult question which was raised, the question of principle which was raised with reference to the right of the company to maintain this action in its present form, and for the relief which was claimed, or by an amendment which has now been asked for, against these trustees, when there is no offer on the part of the company to redeem, or any alternative arrangement suggested whereby the trusts of the deed may be brought to an end. I desire to reserve entirely any decision upon that point, although I agree with what the Lord Justice has said, that as at present advised I do see great difficulties in applying to a deed in this form the neat principles which were enunciated by Mr. Tomlin and Mr. Errington, that in the case of a mortgagor coming for relief against the mortgagee, he can obtain none unless his application be coupled with an offer to redeem. I will, however, say this, that in relation to such a document as this, a debenture stock deed sui generis in many respects, I am not to be supposed to hold that an action of this kind can be brought by the plaintiff company against the trustees, overriding it may be in many respects acts of administration of which the debenture stockholders themselves would approve, without giving these debenture stockholders by making them parties to the action an opportunity of being heard and presenting their views to the Court, and I am more confirmed in this view when I find that in this, as in all other debenture stock trust deeds in this form, there are wide powers given to the debenture stockholders by extraordinary resolutions to do many things in relation to these trust deeds which when done would be binding upon the company, and also I should wish to guard myself against saying that the company, by merely calling itself a cestui que trust, is entitled to say that it can enforce the provisions and trusts of the deed as against the trustees in the same way as the debenture stockholders may be able to do when you find that the company by the very trust deed on which they rely, have covenanted to indemnify the trustees against claims which may be made against them by other persons. It is plain, whatever be the real limits of the company's rights, that in the case of trust deeds of this kind, they are most carefully restricted and it may be that in a future case their precise scope and content will have to be laid down. It is not necessary in this case; it is not necessary to deal with these questions at all in this case. It is enough in the view I take of it, following in this respect my Lord and the Lord Justice, to deal with the question that has arisen on the short ground on which I have attempted to deal with it, and I think that this appeal ought to be allowed.

Solicitors for the appellants: *Vincent & Vincent, for North & Sons, Leeds.*

Solicitors for the respondents: *Swepstone, Stone & Co., for Ford & Warren, Leeds.*

R. M.

EVE J.

1925

May 12.

In re BARRATT.

NATIONAL PROVINCIAL BANK, LIMITED *v.* BARRATT.

[1925. B. 210.]

Will—Tenant for Life and Remainderman—Gift of Whole of Testator's Property of every Description to Wife for Life and then to be divided into Portions —Furniture, Leasehold, and Shares in a Company—Enjoyment in Specie —Intention—Exclusion of Rule in Howe v. *Earl of Dartmouth* (1802) 7 *Ves.* 137*a*.

A testator, after appointing executors and directing the payment of his debts, etc., bequeathed the whole of his property of every description to his wife for life, and after her death he desired his estate to be divided into five portions among his three daughters and four others who were infants. The testator died possessed of personal estate comprising (inter alia) furniture, a leasehold house, and shares in a limited company:—

Held, that the testator, by the language he had used, had evidenced his intention to exclude the operation of the rule in *Howe* v. *Earl of Dartmouth* 7 Ves. 137*a*, and the tenant for life was entitled to enjoy the testator's residuary estate in specie during her life.

Collins v. *Collins* (1833) 2 My. & K. 703 discussed and followed.

By his will dated September 16, 1924, Samuel Barratt, of 3 Woodland Rise, Muswell Hill, in the county of London, appointed the plaintiffs, the National Provincial Bank, Ld., of 185 Aldersgate Street, in the City of London, to be executors of his will, and after directing the payment of all his debts, and funeral and testamentary expenses, gave and bequeathed the whole of his property of every description for her life to his dear wife, Susanna Shepherd Barratt; after her decease he desired his estate to be divided into five portions, one portion being given to each of his three daughters by name, one portion to Edward Francis Borrill, a son of his late stepson, and one portion to be equally divided between the three children of his only son, Arthur McDougall Barratt. All these beneficiaries were made defendants, the last four being infants.

The testator died on October 16, 1924, and his will was duly proved by the plaintiffs on December 9, 1924. The testator died possessed of personal estate of the net value

of 13,268*l.* Such personal estate consisted (inter alia) of household goods, furniture, and personal effects of the approximate value of 720*l.*; a leasehold house known as 3 Woodland Rise, Muswell Hill, in the county of London, of the approximate value of 1350*l.*; and 3000 fully paid 8 per cent. cumulative preference shares of 1*l.* each (valued at 4171*l.* 17*s.* 6*d.*) and 2500 fully paid ordinary shares of 1*l.* each (valued at 3984*l.* 7*s.* 6*d.*) in Ryland & Sons, Ld. (of which company the testator was for many years a director). The question having been raised whether the defendant Susanna Shepherd Barratt was entitled under the will to enjoy the furniture, leasehold premises, and other property constituting the residuary personal estate of the testator in specie during her life, or whether the same (except securities authorized by law for the investment of trust funds) ought to be converted and properly invested, an originating summons was taken out by the plaintiffs to have this question determined.

J. V. Nesbitt for plaintiffs.

Jardine Binnie for the first defendant, the widow, and the three daughters. The intention of the testator as expressed in his will is clearly to exclude the operation of the rule in *Howe* v. *Earl of Dartmouth* (1), and that the widow should be entitled as tenant for life to the whole of the income of the property as it existed at his death, and only upon her death was the estate to be converted and divided into five portions. The three daughters concur in this view. The cases expressly bearing on this point are *Collins* v. *Collins* (2), followed in *Pickering* v. *Pickering* (3), and *Stanier* v. *Hodgkinson.* (4) In the first of these cases the words of the will were extremely like those of the will in the present case, and although the judgment is very short, the decision was followed with approval in both the cases which followed. Here there is no trust declared and no direction for conversion of the property until after the death of the tenant for life.

(1) 7 Ves. 137*a*.
(2) (1833) 2 My. & K. 703.
(3) (1839) 4 My. & Cr. 289.
(4) (1903) 73 L. J. (Ch.) 179.

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Swords for infants entitled in remainder. This case is said to be within *Collins* v. *Collins* (1), but in that case the point was not really decided as reported in Mylne and Keen. It appears from the argument in *Vaughan* v. *Buck* (2) that what was reported as a decision in *Collins* v. *Collins* (1) was in fact a mere dictum, as the case was not ripe for an adjudication upon the point of conversion, and the decree of Sir J. Leach, as drawn up, was a mere reference to the Master to take the usual accounts. The direction to divide the residuary estate is not of itself a sufficient indication of intention to exclude the rule in *Howe* v. *Earl of Dartmouth.* (3) That was expressly decided in *In re Evans' Will Trusts.* (4) There is nothing in the will in the present case to justify the exclusion of the well established rule, and *Collins* v. *Collins* (1) is no binding authority.

EVE J. The question in this case is whether by the language he has used the testator has evidenced an intent to exclude the operation of the rule in *Howe* v. *Earl of Dartmouth.* (3) The language is as near as can be the same as is to be found in *Collins* v. *Collins* (1), where Sir John Leach is reported as having decided that "it was the intention of the testator that his widow should enjoy the leasehold property for her life," but a difficulty is occasioned by Mr. Swords' discovery that *Collins* v. *Collins* (1) was never decided in the manner reported, and that the words I have quoted were a dictum made in the course of some interlocutory application: see *Vaughan* v. *Buck.* (2)

A few years afterwards, however, a very similar will had to be considered by Lord Cottenham in *Pickering* v. *Pickering* (5), and after a statement to the effect that that case was as near to the case he was considering as any two cases could be, he took occasion to add that he entirely concurred in *Collins* v. *Collins* (1), and thought it would be a violation of the testator's intention not to allow the wife

(1) 2 My. & K. 703.
(2) (1841) 1 Ph. 75, 78.
(3) 7 Ves. 137*a*.
(4) [1921] 2 Ch. 309.
(5) 4 My. & Cr. 289.

to enjoy the income of the property as it was. At later dates these two cases have been followed by Stirling J. in *In re Bland* (1) and by Buckley J. in *Stanier* v. *Hodgkinson*. (2) There is, therefore, ample authority for the proposition that a will framed as was the will in *Collins* v. *Collins* (3) evidences an intention that the tenant for life shall enjoy the property in specie, and this will being so framed I have no difficulty in holding that the testator intended his property to remain unconverted during the widow's lifetime, and to give her the enjoyment of it in specie.

Solicitors for all parties : *Martin & Co.*

G. M.

In re DUDMAN.

DUDMAN *v.* DUDMAN.

[1924. D. 1354.]

Donatio mortis causa—Suicide of Donor—Gift invalid.

When at the time a gift is made the donor contemplates suicide, and does in fact commit suicide shortly afterwards, the gift is not a valid donatio mortis causa.

Agnew v. *Belfast Banking Co.* [1896] 2 I. R. 204 followed.

THIS summons raised the question whether a gift made by the deceased, who committed suicide shortly afterwards, was a valid donatio mortis causa. The deceased died intestate on May 7, 1923, and on May 9 the coroner for the district in which she died returned a verdict of suicide during temporary insanity. On June 18, 1923, letters of administration to her estate were granted to her brother, the plaintiff. A few days before her death the deceased handed to her brother three sealed envelopes, which were opened by the coroner at the inquest. In each of the three envelopes

(1) [1899] 2 Ch. 336. (2) 73 L. J. (Ch.) 179.
(3) 2 My. & K. 703.

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there were several smaller envelopes addressed to different near relations of the deceased, and each of these envelopes contained a sum of money, together with a letter written to the addressee. One of the letters, dated April 28, 1923, and written to an aunt of the deceased, was in the following terms: "A line to wish you good-bye. I do not want to live any longer, there is no one that cares, and my ill-health; if I was well, I should not care. But I cannot fight any longer. It has been one long fight for me, and I am so tired of everything. It won't make much difference just a year or two more or less. Good-bye once more, you were very kind to me in days gone by. I hope you will find the enclosed fifty pounds useful." Questions having arisen as to the validity of the several gifts, the plaintiff took out this summons asking whether the several sums of money enclosed in the envelopes or any or either of such sums were effectually given by the deceased to the plaintiff and for the defendants named on the envelopes, or any or either of them as (in each case) a donatio mortis causa, or whether such sums formed part of the estate of the deceased at the time of her death, and were not disposed of by her.

Lyttelton Chubb for the plaintiff.

G. D. Johnston for the next of kin of the deceased. A donatio mortis causa is an immediate gift, but defeasible. It cannot be made to take effect on the suicide of the donor. There is no English case on the point, but it is completely covered by *Agnew* v. *Belfast Banking Co.* (1)

Shebbeare for donees of the gifts. The question whether a gift is a valid donatio mortis causa must depend on whether the donor had the deliberate idea of committing suicide at the time the gift was made. There are material differences between *Agnew* v. *Belfast Banking Co.* (1) and the present case. In that case the donor was in good bodily health. There is no evidence here on the point, but in her letter to her aunt the deceased speaks of her bad health. In the Irish case there was the insanity point,

(1) [1896] 2 I. R. 204.

whilst here there is no clear evidence that at the time she made the gifts she had made up her mind to commit suicide.

RUSSELL J. If the true view to take is that at the time the intestate wrote the letters she had the intention of committing suicide, donatio mortis causa cannot prevail. In the Irish case of *Agnew* v. *Belfast Banking Co.* (1) there could be no doubt that at the time the intestate gave a deposit receipt to her sister she intended to commit suicide, and it was held that the gift under such circumstances did not constitute a valid donatio mortis causa. In giving judgment FitzGibbon L.J. said (2): "But while I think that a danger of death may found a donation, whether it arises from natural causes or is incurred in the discharge of some duty, possibly including the duty of self sacrifice, I hold that a donation cannot be supported on a danger which is so purely voluntary as to be criminal in its origin." And later in his judgment the same learned Lord Justice says (3): "This brings in the dilemma. The delivery of this deposit receipt did not take effect as a gift until the death of the donor. Part of her condition of mind was that it was not to cease to be her property till her death: if she was insane at her death, she had then no capacity to complete the gift: if she was sane, we must attribute to her the intention of giving effect to the gift by a crime. In either event the gift cannot stand." Here it seems to me I have only to read one letter written by the intestate to show that at the time she sent the envelopes containing the gifts to the plaintiff, she contemplated suicide. [His Lordship read the letter written by the deceased to her aunt and continued:] It is impossible to read that letter without coming to the conclusion that at the time she wrote it she intended to commit suicide. The Irish case does not bind me, but it is the decision of a Court for which I have the greatest respect, and I intend to follow it. There will, therefore, be a

(1) [1896] 2 I. R. 204. (2) [1896] 2 I. R. 221.
(3) [1896] 2 I. R. 223.

RUSSELL J. 1925 DUDMAN, *In re.* DUDMAN *v.* DUDMAN.

declaration that the sums of money in question formed part of the estate of the intestate at the time of her death, and were not disposed of by her.

Solicitors: *H. C. L. Hanne; Long & Gardiner.*

P. J. B.

ASTBURY J. 1925 *May* 18.

In re COLLINS.

[933 of 1924.]

Bankruptcy—Order and Disposition—Trade or Business—Surveyor and Assessment Specialist—Contracts for personal Service in latter Capacity—Moneys earnable by personal Skill—Mortgage of Contracts—No Notice to Clients—Moneys earned before Bankruptcy—Bankruptcy Act, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 38 (*c*)*—Moneys earned after Bankruptcy—Bankrupt employed by Trustee to complete Contracts — Invalidity of Mortgage as against Trustee.*

For some years before his bankruptcy a surveyor and assessment specialist with a staff of clerks had entered into contracts with clients for personal service in the latter capacity. Under these contracts he had to value his clients' properties for rating purposes and give expert evidence on their appeals, his remuneration being a percentage of the reduction of their assessments when obtained. He mortgaged these contracts and the sums to become due on completion thereof to a mortgagee, who by special arrangement with the mortgagor gave no notice to the clients so as not to imperil the mortgagor's business position, the mortgagor being allowed to collect the fees when due in his own name and hand them over to the mortgagee.

At the date of the mortgagor's bankruptcy, some fees (*a*) were due on completed contracts, but some fees (*b*) were still unearned. The trustee employed the bankrupt and some of his staff to carry out the uncompleted contracts and earn fees (*b*):—

Held, that though the work to be done under the contracts required a certain amount of technical skill on which the bankrupt's clients relied, it was nevertheless part of the bankrupt's business, so that the fees (*a*) due at the date of the bankruptcy were due to him "in the course of his trade or business" and being in his order and disposition by the consent of the mortgagee belonged to the trustee under s. 38 (*c*) of the Bankruptcy Act, 1914.

Rutter v. *Everett* [1895] 2 Ch. 872 and *In re Neal* [1914] 2 K. B. 910 applied.

Held also that the mortgage of fees (*b*) earned since the bankruptcy was inoperative against the trustee.

Ex parte Nichols (1883) 22 Ch. D. 782, and *Wilmot* v. *Alton* [1897] 1 Q. B. 17 applied.

MOTION.

Collins was a surveyor and valuer in large practice with a staff of five clerks. His main occupation however consisted in advising, as an assessment specialist, municipal and other undertakings and large corporations with regard to rating assessments on their properties, valuing their properties for that purpose, and giving expert evidence on their appeals. Under his contracts with these bodies he was remunerated by a percentage of the reduction of the assessments when obtained. Occasionally he had also a small retaining fee.

From January 18, 1922, to August 17, 1923, Collins made twenty-two mortgages of these contracts and the sums to become due on completion thereof to a mortgagee to secure large advances. By arrangement with Collins, the mortgagee gave no notice of these mortgages to the prospective debtors, so as not to imperil Collins' business position, but when any money became due for work completed Collins collected and gave a receipt for it in his own name, and handed it over to the mortgagee.

On July 12, 1924, a receiving order was made against Collins on his own petition. This was the act of bankruptcy. On August 7 he was adjudicated bankrupt and a trustee was appointed by the creditors, this appointment being subsequently certified by the Board of Trade on August 11.

At the date of the receiving order large sums were still secured by the mortgages. Some fees were due on completed contracts. Some contracts were uncompleted, so that the fees were still unearned.

On September 3, 1924, the trustee gave notice to all the debtors to pay their debts to him, and subsequently on September 11, 1924, the mortgagee gave notice of his mortgages to all the debtors.

After the receiving order Collins and some of his staff were engaged at a salary by the trustee to complete the uncompleted contracts. Some were now completed, some still in course of completion.

ASTBURY J. 1925 COLLINS, *In re.*

The mortgagee claimed that (*a*) the amounts actually earned on the contracts completed at the date of the receiving order and (*b*) the amounts subsequently earned and to be earned on the uncompleted contracts were subject to his mortgages.

The trustee took the view that the amounts earned at the date of the receiving order were in the order and disposition of the bankrupt, and the amounts earned since were simply earned on the trustee's behalf, and in no way subject to the mortgages.

On February 26, 1925, the trustee issued a notice of motion, which as amended on April 6, asked for (*a*) a declaration that the moneys assigned by the mortgages so far as they had been earned by the bankrupt at the commencement of the bankruptcy were debts due or growing due to him in the course of his trade or business, and at the commencement of the bankruptcy were in the possession, order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, and under such circumstances that the bankrupt was the reputed owner thereof and accordingly formed part of the bankrupt's property divisible amongst his creditors and vested in the trustee; and (*b*) a declaration that the mortgages so far as the sums purported to be assigned had not been earned at the commencement of the bankruptcy were inoperative and of no effect against the trustee, and that such sums when earned formed part of the bankrupt's property divisible amongst his creditors and vested in the trustee.

In the actual notice of motion declarations (*a*) and (*b*) were in the reverse order, but as the case was argued in the order above stated, they have been transposed accordingly.

Sect. 38 of the Bankruptcy Act, 1914, provides that the property of the bankrupt divisible amongst his creditors shall comprise (*c*) all goods being, at the commencement of the bankruptcy, in the possession, order or disposition of the bankrupt, "in his trade or business," by the consent and permission of the true owner, under such circumstances that he [the bankrupt] is the reputed owner thereof; provided

that "things in action" other than debts due or growing due to the bankrupt "in the course of his trade or business" shall not be deemed goods within the meaning of this section.

Clayton K.C. and *Harold Murphy* for the trustee. The fees were clearly earned or earnable in the bankrupt's trade or business. The fees (*a*) earned before the receiving order were therefore within the bankrupt's order or disposition within s. 38 (*c*): *Rutter* v. *Everett* (1); *In re Neal.* (2)

The fees (*b*) earned after the receiving order were of course not within that section, but they were really earned by the trustee carrying on the business with the bankrupt's assistance. The mortgages of these fees are invalid against the trustee: *Ex parte Nichols* (3); *Wilmot* v. *Alton.* (4)

Hansell for the mortgagee. The fees under the contracts were for personal services rendered by the bankrupt in the exercise of his personal skill and in his capacity as an assessment specialist. They were not debts due or growing due to him "in the course of his trade or business" within s. 38. That section was really directed against obtaining fictitious credit by suppressing mortgages of stock or ordinary book debts. It does not apply to any of these fees.

It is admitted that s. 38 does not apply to (*b*) fees earned since the receiving order, but it is suggested that they were earned by or on behalf of the trustee and that the mortgages were invalid against him under *Ex parte Nichols* (3) and *Wilmot* v. *Alton.* (4) But in those cases the contracts were part and parcel of the actual businesses carried on by the Alexandra Palace lessees, and the theatrical costumier respectively, and those businesses passed to the trustee, who alone could carry them on. In the present case the contracts were for purely personal services by the bankrupt as assessment specialist and, although the surveyor's business passed to the trustee, the bankrupt alone was capable of completing these personal service contracts. The ratio decidendi of

(1) [1895] 2 Ch. 872.
(2) [1914] 2 K. B. 910.
(3) 22 Ch. D. 782.
(4) [1897] 1 Q. B. 17.

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Ex parte Nichols (1) and *Wilmot* v. *Alton* (2) ought not to be extended to such a case.

Ex parte Nichols (1) was distinguished in *In re Davis & Co.* (3), where an assignment of a hiring agreement was held valid against the trustee, even as to the instalments accruing due after the bankruptcy.

ASTBURY J. [after stating the facts :] The question which I have to determine divides itself into two heads, first with regard to the moneys due under contracts completed before the receiving order ; and, secondly, with regard to moneys due or to become due under contracts not then completed, but subsequently completed by the trustee who employed and is employing the debtor and some of his clerks for that purpose.

With regard to the first class I am of opinion that the debts mortgaged were in the order and disposition of the bankrupt at the commencement of his bankruptcy.

In *Rutter* v. *Everett* (4) it was held that " In order to take book debts out of the order and disposition of an assignor the assignee must give notice to the debtors, and take every possible step to obtain possession of the debts. A mortgagee of book debts who, without notice of any act of bankruptcy by the mortgagor, gives the debtors notice of his assignment is entitled to the protection conferred by the Bankruptcy Act, 1883, s. 49 [Bankruptcy Act, 1914, s. 45]. Although, from the absence of notice, consent on the part of the true owner to a debt remaining in the order and disposition of a bankrupt is prima facie to be inferred, the inference will be rebutted if the true owner takes every possible step to obtain possession of the debt, or if his failure to obtain possession is not attributable to his own fault." In this case the mortgagee not only took no steps to obtain possession of these debts, but deliberately agreed with the bankrupt that in order to save his credit and assist his business no notice to the debtors should be given.

(1) 22 Ch. D. 782.
(2) [1897] 1 Q. B. 17.
(3) (1888) 22 Q. B. D. 193.
(4) [1895] 2 Ch. 872.

A similar result is shown in *In re Neal* (1), and for these reasons I think the trustee is entitled to the declaration he seeks under the order and disposition section with regard to such of these debts as became due on contracts completed before the receiving order.

The second class is perhaps more difficult to decide. At the date of the receiving order a large number of these mortgaged contracts were uncompleted. It is quite true that to some extent the persons who had been employing the bankrupt relied upon his personal skill and capacity, but only to a certain extent. He was carrying on business as a surveyor with a substantial staff of clerks, and he and these clerks between them carried out these various contracts. When the bankruptcy started the trustee had to decide whether he would or would not carry out these uncompleted contracts and earn the moneys subsequently payable thereunder on completion. He decided to do so, and for that purpose he employed the bankrupt at a weekly salary, and also some of his clerks, and he has completed some and is in course of completing others. No case of "order and disposition" arises or is relied upon with regard to this second lot of contracts, but the trustee rightly contends that these debts, arising from his completion of these various contracts, were not debts owing to the bankrupt which could be mortgaged in the way I have mentioned.

On this point the trustee specially relies on *Ex parte Nichols* (2) and *Wilmot* v. *Alton.* (3) In *Ex parte Nichols* (2) it was held that: "An assignment by a trader of the future receipts of his business, even if made for value, is, as regards receipts accruing after the commencement of his subsequent bankruptcy, inoperative as against the title of the trustee in the bankruptcy." There the bankrupts, who carried on the business of the Alexandra Palace, were entitled from time to time to part of the moneys received for joint rail and admission tickets issued by a railway company under a contract with them. They assigned the future receipts of

(1) [1914] 2 K. B. 910. (2) 22 Ch. D. 782.
(3) [1897] 1 Q. B. 17.

ASTBURY J. 1925 COLLINS, *In re.*

that business; the bankruptcy intervened, and the trustee stepped in as regards the business. Bowen L.J. said (1): "These payments in futuro were not property of the bankrupts which they could assign as against the title of the trustee in their bankruptcy."

Now that is very fully dealt with in *Wilmot* v. *Alton.* (2) In that case "a trader who carried on the business of a theatrical costumier, contracted with a company to supply dresses for a ballet and keep them in repair for the sum of 40*l.* a week for twelve weeks commencing from a certain date. She subsequently charged her right and interest under the contract in favour of the plaintiff as security for an advance made by him. The dresses were duly supplied to the company under the contract, but before any moneys became payable under it the trader became bankrupt"; and it was held: "that the charge in favour of the plaintiff gave no title as against the defendants, the trustees in bankruptcy, to moneys which might become due under the contract after the bankruptcy." Lord Esher M.R. said (3): "In my opinion the true construction of the contract is that she would be entitled to be paid at the end of each week, if during the week she had done all that was required, or had been ready and willing to do all that might have been required under the contract. Therefore, to entitle her to payment of the moneys payable under the contract, she had to perform onerous conditions during the whole of the period mentioned. During the period contemplated by the contract she became bankrupt. The effect of that was that she could no longer fulfil the contract. The trustee in bankruptcy in such a case may, if he thinks it for the benefit of the estate, carry on the business and the contract; but he is not obliged to do so. He would have a right to say that he would not have anything to do with the contract. If the trustee in this case had done so, no moneys not already accrued due under the contract could after that become payable to any one under it. After the bankruptcy therefore no money would

(1) 22 Ch. D. 787. (2) [1897] 1 Q. B. 17.
(3) [1897] 1 Q. B. 20.

have become payable under the contract, unless the trustee had elected to go on with it, and to perform the conditions which by the terms of it were to be performed by the bankrupt." Subject to one question, which I will deal with, that seems to me to apply entirely to the present case. Rigby L.J. said (1): "Though the circumstances of this case are very different from those which existed in *Ex parte Nichols* (2), I think that the principle which is applicable to the two cases is the same. Where a person who has entered into contracts in the course of his business ceases to carry on business on account of bankruptcy, there is an important distinction, for the present purpose, between cases in which, the consideration for the contract having been wholly executed by the bankrupt on his part, a sum of money becomes due to him under the contract, and cases of executory contracts in which the money will not be earned under the contract unless the person contracting continues to carry on business and fully performs his part of the contract which has only been partially performed at the date of the bankruptcy. In the latter class of cases the bankrupt cannot create greater rights in favour of an assignee from him than he has himself; it rests with the trustee to say whether the business is to be carried on and the contract performed or not, and, if he elects to perform it, he has a right to the consideration for such performance when it becomes due. That is the fair principle which appears to me applicable to the present case."

That is decisive of this question, except as to one point taken by the mortgagee, if that point is sound. He says that this is not a case of a trader carrying on a business within the meaning of these authorities, but a case where moneys may become payable in the future under certain contracts made in reliance upon the bankrupt's personal skill and personal work. There are two answers to that: In the first place it is perfectly plain that the bankrupt in the present case carried on a business. It is quite true there was a certain amount of technical skill involved in the carrying on of this business, but it was nevertheless a business

(1) [1897] 1 Q. B. 22. (2) 22 Ch. D. 782.

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carried on by him for the purpose of gain, he and a staff of clerks doing the necessary work; secondly, having regard to that fact, the authorities I have referred to completely cover the point. I was told, I have no doubt accurately, that there is no reported case quite similar to the present, but for the reasons I have given, the order and disposition clause covers the first set of cases I have mentioned, and the ratio decidendi in *Ex parte Nichols* (1) and *Wilmot* v. *Alton* (2) covers the second. There must therefore be a declaration in the terms of the notice of motion.

Solicitors: *Stephenson, Harwood & Tatham; Moeran & Co.*

G. R. A.

C. A. 1925 *April* 24.

In re ELLIS.

[9 of 1924.]

Deed of Arrangement—Assignment by Debtor for Benefit of Creditors generally —"Creditor"—Charge in Priority to Deed—Application by Creditor to enforce—Adverse Claim to Deed—Summary—Procedure—Jurisdiction of Court—Deeds of Arrangement Act, 1914 (4 & 5 *Geo.* 5, *c.* 47), *s.* 23.

By the Deeds of Arrangement Act, 1914, s. 23: "Any application by the trustee under a deed of arrangement, which either is expressed to be or is in fact for the benefit of the debtor's creditors generally, or by the debtor or by any creditor entitled to the benefit of such a deed of arrangement, for the enforcement of the trusts or the determination of questions under it, shall be made to the Court having jurisdiction in bankruptcy. . . . . Provided that any question as to whether any person claiming to be a creditor entitled to the benefit of a deed of arrangement is so entitled may, subject to rules made under this Act, be decided either by the Court having such jurisdiction as aforesaid or by the High Court."

In 1922 the appellant entered into the employment of the debtor as manageress of his business, and as a condition of such employment she lent him a sum of 500*l*, for the repayment of which he gave her a charge on his share and interest in his business. In 1924 the debtor executed a deed of arrangement for the benefit of his creditors generally. The deed was expressed to be made between the debtor of the first, the trustee of the second part, three named creditors of the third part, and "the several persons, companies, and partnership firms (being creditors of the debtor) whose names and seals are set out and affixed to the schedule

(1) 22 Ch. D. 782. (2) [1897] 1 Q. B. 17.

hereto, or who shall otherwise in writing assent to these presents (who are hereinafter called 'the creditors')," of the fourth part. The appellant, who refused to consent to the deed, applied under s. 23 of the Act of 1923 for a declaration that she was entitled as against the trustee of the deed to a charge on all the share and interest (with the exception of chattels) of the debtor in his business, and for an order that the trustee should hand over and execute such documents as might be necessary for the purpose of transferring the share and interest to the appellant. The Registrar in Bankruptcy dismissed the application on the ground that he had no jurisdiction under s. 23 to entertain it. On appeal:—

Held, (1.) that the object of s. 23 was to provide a trustee or cestui que trust under a deed of arrangement with a summary means of obtaining a determination of questions arising in the administration of the trusts of the deed similar to that provided by originating summons in the Chancery Division under Order LV., r. 3. (2.) That the appellant was not a creditor entitled to the benefit of the deed; that creditors so entitled were those defined as such by the deed; and that the appellant, not having assented to the deed, did not come within that category. (3.) That the appellant's claim was not for the enforcement of the trusts or the determination of any questions arising under the deed within the meaning of s. 23, but was a claim to enforce a right adverse and paramount to the deed.

Decision of the Registrar affirmed.

APPEAL from the decision of Mr. Registrar Hope.

In April, 1922, the appellant entered into the employment of the debtor as manageress of his business of dressmaker and ladies' tailor. As a condition of her employment she lent to the debtor for the purpose of his business a sum of 500*l.*, and an agreement was entered into between them dated April 28, 1922, setting out the terms of the appellant's employment and the conditions on which the loan was made. By cl. 1 of the agreement the debtor charged all his share and interest in his business with the repayment to the appellant of the 500*l.* advanced by her with interest thereon at 10 per cent. By cl. 2 it was provided that the appellant should be employed as manageress of the business at a salary of 4*l.* per week, and should receive a percentage on the profits of the millinery branch of the business.

Interest on the 500*l.* was duly paid up to October 28, 1923, but since that date no payment had been made by the debtor to the appellant either in respect of interest or in repayment of any part of the principal sum of 500*l.* advanced under the agreement.

C. A. 1925 ELLIS, *In re.*

On May 22, 1924, the debtor executed a deed of arrangement for the benefit of his creditors generally. The deed was expressed to be made between the debtor of the first part, the trustee of the second part, three named principal creditors of the third part, and "the several persons, companies, and partnership firms (being creditors of the debtor) whose names and seals are set out and affixed in the schedule hereto, or who shall otherwise in writing assent to these presents (who are hereinafter called 'the creditors')," of the fourth part.

On May 23, 1924, the trustee, by direction of the principal creditors, wrote to the creditors, including the appellant, that he was preparing a statement of the debtor's affairs, asking for a statement of account, and stating that for the protection of the estate a deed of assignment had been taken to the trustee for the general benefit of the creditors.

On May 27, 1924, the deed was registered.

On the same day the appellant's solicitors wrote to the trustee informing him that there was a loan of 500*l.* due to the appellant, for which the debtor had given her a charge on his share and interest in his business.

On May 28, 1924, the trustee wrote to the appellant's solicitors asking for a copy of the charge, which was sent to him on May 29 and the receipt acknowledged by him on May 31.

On June 25 a claim was made by the appellant under her charge, which the trustee refused to recognize.

Ultimately, on July 18, 1924, the trustee gave notice in writing to all the book debtors of the execution of the deed, and required payment by them of their debts.

The appellant had not assented and declined to assent to the deed.

On November 20, 1924, the appellant gave notice of motion under s. 23 of the Deeds of Arrangement Act, 1914, for a declaration that she was entitled as against the trustee of the deed to a charge on all the share and interest (with the exception of chattels) of the debtor in his business, and for an order that the trustee should hand over and execute such

documents as might be necessary for the purpose of transferring the share and interest to the appellant.

On the hearing before the Registrar a preliminary objection was taken on behalf of the trustee, that the appellant was not a creditor entitled to the benefit of the deed under s. 23, but was claiming adversely to it.

The Registrar upheld the objection and dismissed the motion.

The appellant appealed. The appeal was heard on April 24, 1925.

Tindale Davis for the appellant. It is submitted that the decision of the Registrar was wrong on the following grounds: (1.) that the deed was a deed for the benefit of creditors generally; (2.) that s. 23 of the Deeds of Arrangement Act, 1923, is not confined to assenting creditors; and (3.) that the appellant is entitled to the benefit of the deed by reason of the fact that she is an admitted creditor in respect of her salary and presumably commission.

The deed was not confined to a limited class of creditors, but was for the benefit of creditors generally. That being so, it is submitted that the appellant being a general creditor of the debtor is entitled to the benefit of s. 23. Although the appellant has refused to assent to the deed she is still a person who can assent to it at any time.

The Registrar has held that the appellant is claiming adversely to the deed, and that s. 23 does not therefore apply. But she is claiming against the trustee something which did not pass to him by the deed for the benefit of the creditors, and the question is whether she is entitled to the summary remedy provided by s. 23 apart from her right of action in the Chancery Division.

[WARRINGTON L.J. The claim made in the notice of motion is surely a claim adverse to the deed.]

The proviso to the section goes a long way to assist the appellant. She is certainly a person who is entitled to the benefit of the deed.

[SARGANT L.J. She is entitled to entitle herself if she does

C. A. 1925 ELLIS, *In re.*

something which up to the present she has not done. Her claim is entirely based on the agreement between herself and the debtor.]

The appellant is a secured creditor, and the rights of secured creditors are preserved by the deed. She is therefore a creditor entitled to the benefit of the deed.

Further, it is submitted that secured creditors are entitled to the benefit of s. 23 equally with creditors who have assented to the deed: *In re Pilet.* (1) In that case Horridge J. said: "In order that the Court may have jurisdiction to deal with the matter it is necessary to decide in the first place whether the deed is a deed for the benefit of creditors generally; and the whole of my judgment in this case must be taken to be founded on the fact that this is a deed for the benefit of creditors generally which Mr. Hansell has admitted as the basis of his argument. This means that any creditor, if he was not already mentioned in the schedule to the deed, would have the right to come in and join in taking the benefit of the trusts of the deed." Here it is admitted that the deed is operative, but it is subject to the appellant's rights.

The nature of the remedy given by s. 23 is discussed by Warrington L.J. in *In re Wilson.* (2)

P. B. Morle for the respondent, the trustee of the deed, was not called upon.

POLLOCK M.R. This appeal fails. It raises a neat little point, which has been well put before us by Mr. Tindale Davis, as to the effect and meaning of s. 23 of the Deeds of Arrangement Act, 1914.

It appears that in this case the debtor made a deed of arrangement, dated May 22, 1924. Before that date he had entered into an agreement with the appellant dated April 28, 1922. It provided for the engagement of the appellant as the manageress of the debtor's business, and it also provided for an advance to be made by the appellant to the debtor, and gave her an equitable charge on the business. It is admitted that the charge would not be effective upon the

(1) [1915] 3 K. B. 519, 524. (2) [1916] 1 K. B. 382, 400.

chattels of the business; but that it would be effective on the book debts of the business. When the deed of arrangement was entered into under which the respondent was made the trustee, the appellant declined to give her assent to it. On May 23 a notification of the deed was sent to her, and on May 27 a notice of her charge was given to the trustee. Subsequently a copy of the charge was sent to the trustee in order that he might see its exact terms, the receipt of which was duly acknowledged by him on May 31. On June 25 a claim was made under the charge, but the trustee refused to recognize the charge. Ultimately on July 18 the trustee gave notice to the book debtors to pay their debts to him. The appellant has not up to the present time assented to the deed. She contends that she has a charge upon the book debts, which is independent of and anterior to the deed, and that all that the debtor could pass under the deed of arrangement of May, 1924, was such interest as he had left after her charge had been satisfied. She relies upon her charge, and desires that the debtor's property so charged should be kept out of and separate from the property which passes under the deed. It is true that the debtor did not by the terms of the deed pass or purport to pass more than the interest that remained in him.

Now s. 23 of the Act of 1914 gives to persons who are creditors of a debtor who makes a deed of arrangement in their favour and the trustee an opportunity of having questions which may arise under the deed summarily decided, and as has been said already (and I think with truth) the object of the section is to give a speedy remedy similar to that now commonly given with great advantage by originating summons in the Chancery Division.

An application was made by the appellant that she should have certain questions decided, and she made her application under s. 23. There is no doubt that she can have her rights secured by other methods. They can be determined in an action. The sole question we have to determine is whether or not the appellant is a person who is entitled to take advantage of the speedy remedy provided by s. 23 of the Act of 1914.

C. A. 1925 ELLIS, *In re.* Pollock M.R.

Mr. Tindale Davis admits that the appellant has not assented to the deed. He has said that it may be that she will assent to the deed. When asked by the Registrar whether the appellant would consent to the deed he definitely stated that she would not do so; but he says (and I think he is right in so saying) that she can recall that refusal and assent if and when she thinks right to do so. Inasmuch as there is a clause in the agreement made between the appellant and the debtor under which certain wages fall due to her, it may well be that in respect of those wages she would have a right independently of the question of the charge for the 500*l.* to come in under the deed as a creditor in respect of them. But at the present moment she has not assented to the deed, and she has claimed that her charge is a charge superior to the deed in the sense that the interest of the debtor which passed under the deed was what was left after her rights had been effectively preserved by the charge.

Sect. 23 appears to me to provide first of all that where a deed of arrangement is expressed to be, or is in fact for the benefit of the debtor's creditors generally (and that is a condition precedent), an application may be made to the Court by three categories of persons—namely, by the trustee, by the debtor, or "by any creditor entitled to the benefit of such a deed of arrangement." For a person to come within the third and last category to which I have referred he must be a creditor who is entitled to the benefit of such deed of arrangement—that is to say, a person who, although perhaps it is unnecessary that he should actually have assented to the deed, makes the application because he claims to enforce and to hold the position of one entitled to enjoy, the benefit of the deed. That is the effect of the body of the section.

Then there is a proviso to the section, which deals with a preliminary matter that may arise. Although a particular creditor may claim and desire to be entitled to the benefit of the deed, it may be said by the trustee that the creditor is mistaken and that he is not entitled to the benefit and that he ought not to be put upon the schedule of creditors. The proviso enables questions of that kind to be determined,

because it provides that "any question as to whether any person claiming to be a creditor entitled to the benefit of a deed of arrangement is so entitled may, subject to rules made under this Act, be decided either by the Court having such jurisdiction as aforesaid or by the High Court."

In the present case the appellant does not fall within any one of the three categories, nor within the proviso. Her claim is one independent of the deed; it is not a right to take advantage of the benefit of the deed, but one that arises completely outside the deed, and so far as she is concerned she is prepared for the purpose of securing her rights to disregard the deed and all its benefits.

Under these circumstances it appears to me that the decision of the Registrar was right, and the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. The question is whether the Registrar representing the Court having jurisdiction in bankruptcy had jurisdiction under s. 23 of the Deeds of Arrangement Act, 1914, to determine a question raised by the appellant. Sect. 23 provides a summary means for determining in the Court having jurisdiction in bankruptcy certain questions upon the application of certain persons, and the present case raises two points under that section. The first and most important is whether the appellant was one of the class of persons entitled to apply, and the second is whether the question which she sought to have determined was a question which could be determined under that summary jurisdiction.

The words of the section which are material are these: "Any application by the trustee . . . . or by the debtor or by any creditor entitled to the benefit of such a deed of arrangement, for the enforcement of the trusts or the determination of questions under it, shall be made to the Court having jurisdiction in bankruptcy. . . . ."

The first of the two questions to which I have referred is this: Is the appellant a person entitled to apply, that is to say, is she a creditor entitled to the benefit of such a deed of

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arrangement ? I think that that question can be answered first by looking at the definition of creditors contained in the deed, and secondly by seeing the attitude taken up by the appellant herself. Creditors are defined in the deed as being the three persons or companies who are named "and the several persons, companies and partnership firms (being creditors of the debtor) whose names and seals are set and affixed in the schedule hereto or who shall otherwise in writing assent to these presents." The appellant was not one of the three named persons ; she is not one of the creditors whose names and seals are set and affixed in the schedule, nor has she otherwise in writing assented to the deed. It is said that, notwithstanding that she is not a creditor within the meaning of the deed, she is entitled to the benefit of the deed, because she could at a future time come in and consent. Now in my judgment it is essential in order to entitle a creditor to make an application under the summary jurisdiction in question that he should be a creditor entitled to the benefit of the deed at the time he makes the application, and that he should make the application in that capacity, because otherwise the application could be made by a creditor outside the deed altogether who was not a cestui que trust, but who was claiming adversely to it. That is really the position of the appellant. It is only necessary to look at the notice of motion upon which the application to the judge in bankruptcy is founded to see that the appellant has put herself entirely out of Court on this question of jurisdiction, because what she asks for is a declaration that she is entitled as against the trustee of the deed under the terms of the agreement of April 28, 1922, between herself and the debtor to a charge on all the share and interest, with the exception of chattels, of the debtor in his business named, and for an order that the trustee should hand over, transfer or execute such documents as might be necessary for the purpose of transferring the share and interest to her ; that is to say, she claims not as a cestui que trust under a deed, but as one who is asserting that the property over which she claims a charge did not pass to the trustee at all except subject to her charge. In

my opinion, not only was she not entitled to the benefit of the deed at the time when she made the application, but she did not even claim to be so entitled, because she claimed adversely to the deed.

With regard to the second question, that also must, in my opinion, be determined against the appellant. That question is whether the application which she makes was for the determination of a question under the deed. It clearly was not. She was not asserting that the property which she claimed passed under the deed and was to be administered by the trustee under the deed, but she was asserting that she had a paramount right which had to be satisfied before the deed could come into operation. That seems to me to be not a question under the deed, but a question adversely to the provisions of the deed.

On both points the Registrar was right, and the appeal must be dismissed.

SARGANT L.J. I am of the same opinion. In my judgment the appellant here fails on each of the grounds of objection given effect to by the Registrar.

In the first place I do not think that she is a creditor entitled to the benefit of the deed of arrangement in question. The creditors entitled to the benefit are by the very definition in the deed creditors "whose names and seals are set and affixed in the schedule hereto or who shall otherwise in writing assent to these presents." Really Mr. Tindale Davis' argument strikes out from the section the words "entitled to the benefit of such a deed of arrangement," because any creditor in the case of a deed of arrangement for the general benefit of creditors is entitled, if he takes the proper steps, to entitle himself to the benefit of the deed of arrangement. As far as I can see here, the position of the appellant is merely this—that she is entitled if she thinks fit, or was entitled if she thought fit, to entitle herself to the benefit of the deed of arrangement by assenting to it in writing.

With regard to the second point, it is, in my opinion, equally clear that the application is not for the enforcement

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of the trusts or the determination of any questions arising under the deed of arrangement, but makes a claim adversely to the deed of arrangement and to enforce a right paramount and prior to the deed over the property dealt with by the deed. I entirely adopt the language of Warrington L.J. in *In re Wilson.* (1) It seems to me that the object of the section was to enable the trustee or a cestui que trust under a deed of arrangement to obtain a summary determination of questions arising in the administration of the trust similar to the rights given to cestuis que trust in the Chancery Division by virtue of Order LV., r. 3, or to persons desiring to have the construction of a deed or writing in any division by virtue of the provisions of Order LIV.A. The claim here is not, in my judgment, within the definition in the section, an enforcement of the trusts or the determination of questions arising under the deed of arrangement.

The decision of this Court and of the Registrar I need hardly say is altogether without prejudice to any right that the appellant may have to enforce by way of ordinary action against the trustee under the deed of arrangement. That right is left entirely untouched. Our decision is only on this neat point of procedure.

Appeal dismissed.

Solicitors for appellant: *Graham, Son & Drewry.*
Solicitors for respondent: *Boyce & Evans.*

(1) [1916] 1 K. B. 382, 400.

W. I. C.

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In re GIBBS AND HOULDER BROTHERS AND COMPANY, LIMITED'S, LEASE.

HOULDER BROTHERS AND COMPANY, LIMITED *v.* GIBBS.

[1924. H. 3294.]

Landlord and Tenant—Lease—Covenant against Assignment without Licence—Licence not to be withheld Unreasonably—Proposed Assignee a yearly Tenant of adjoining Premises belonging to same Lessor—Consent withheld on Ground of Danger of losing Tenant and Difficulty of reletting Premises.

In a lease for years the lessees covenanted not to assign the premises, or any part thereof, without the consent in writing of the lessor, such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation. The lessees agreed to assign, subject to the consent of the lessor, to R., Ld., who were in possession of adjoining premises on a yearly tenancy from the same lessor. The lessor refused to give his consent to the assignment on the ground that he would lose good tenants of the adjoining premises, and would have great difficulty in reletting them. Tomlin J. held that the licence had been unreasonably withheld, and that the lessees were free to assign.

On appeal:—

Held, that the refusal of the licence was unreasonable, as the reason given for it was one which had no reference either to the personality of the proposed assignee or to the subject matter of the lease.

Views of A. L. Smith L.J. in *Bates* v. *Donaldson* [1896] 2 Q. B. 241, 247 preferred to those of Kay L.J. Ibid. 244.

Decision of Tomlin J. ante p. 198 affirmed.

APPEAL from a decision of Tomlin J.

By an indenture of lease dated September 29, 1908, the defendant demised to the plaintiffs premises known as the White Building, No. 10 Market Street, Sheffield, for a term of twenty-one years from September 29, 1908, and the plaintiffs thereby covenanted that they would not during such term, without the consent of the defendant first obtained, assign, sub-let, or part with the possession of the demised premises or any part thereof, "such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation."

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Early in June, 1924, the plaintiffs agreed to assign the premises to Roneo, Ld., for the residue of the term, subject to the consent of the defendant. Roneo, Ld., were yearly tenants from the defendant of No. 12 Market Street, adjoining the premises the subject of the lease.

By a letter dated June 18, 1924, addressed to the plaintiffs' manager, the defendant expressed his unwillingness to consent to the proposed assignment, on the ground that such assignment would result in Roneo, Ld., determining their tenancy of No. 12 Market Street.

On August 30 the defendant wrote a letter to the solicitor of Roneo, Ld., in which he stated that he had not the slightest objection to Roneo, Ld., on the ground of respectability and responsibility.

On September 2 the defendant again wrote to the same solicitor a letter in which he said: "My sole reason for withholding my consent is on the reasonable ground that by the assignment I should lose Roneo, Ld., as good tenants of No. 12, and because I shall have great difficulty in finding any tenant for No. 12."

The plaintiffs taking the view that the defendant's reason for withholding his consent to the assignment was unreasonable, took out this summons asking for a declaration (1.) that on the true construction of the lease, and in the events which had happened, the refusal of the defendant to grant a licence to the plaintiffs to assign the lease to Roneo, Ld., was unreasonable; and (2.) that notwithstanding such refusal the plaintiffs, without any licence from the defendant, were entitled to assign the lease to Roneo, Ld.

Tomlin J. held that the licence had been unreasonably withheld and that the plaintiffs were free to assign.

The defendant appealed. The appeal was heard on May 4, 5, 1925.

Gavin Simonds K.C. and *R. F. Roxburgh* for the appellant. The question is what is the test of unreasonableness? Is an objection a bad one unless it is founded on the personality of

the proposed assignee or the proposed user of the premises? Can the lessor take into consideration extraneous circumstances? Suppose, for example, that the lessor was a grocer and the proposed assignee was intending to carry on a rival business a few doors off, would that be a ground for refusing consent? It is submitted that an objection is tenable whether by the lessor as owner of the premises or by him as carrying on a competing business. In the letter of August 30, 1924, the lessor quite frankly states what his objections are. Roneo, Ld., are quite content to remain in their present premises unless they can obtain the tenancy of No. 10. The lessor has reasonable grounds for believing that if he were to consent to the assignment to them he would lose tenants who are now paying him 295*l.* a year rent for the premises at No. 12, and that he would have a difficulty in the present state of trade in Sheffield in finding other tenants to take their place. There is no doubt as to Roneo, Ld., being a respectable and responsible corporation. It is submitted that there is nothing to limit the meaning of the proviso to the covenant. It shows that even if the proposed assignee is a respectable and responsible person the lessor may refuse his assent provided that such refusal is not unreasonable.

[SARGANT L.J. Is not the test of reasonableness whether the lessor protects his interest as lessor?]

Not qua lessor but qua an individual.

[SARGANT L.J. Does not the proviso mean unreasonable having regard to the relation of landlord and tenant?]

It is admitted that the proposed user might be such as to render the refusal unreasonable.

If the proposed assignee is respectable and responsible all that the lessor has to do is to show that he is not acting arbitrarily and capriciously in refusing his consent. On the language of the clause there is no ground for imposing any restriction. The test is has the lessor acted unreasonably? It is submitted that a refusal is reasonable if it is such that a jury would hold it to be so.

In deciding whether or not he will give his consent to an

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assignment a lessor is entitled to take into consideration the effect which such assignment will have upon his other property. In *Treloar* v. *Bigge* (1) there was no suggestion that there was any limitation on the reasonableness of an objection: see also *Barrow* v. *Isaacs & Son.* (2) The exact point which is now before the Court has never been the subject of judicial decision. *Governors of Bridewell Hospital* v. *Fawkner* (3) was a case in which it was alleged that the assignment would affect other property of the lessor, and it was held that a refusal in such a case was tenable if it was based on the fear by the lessor of the deterioration of other property of his.

In *Bates* v. *Donaldson* (4), which is the case most relied on by the respondents, Kay L.J. appears to have thought that there might be something extraneous to the relation of landlord and tenant which might justify the refusal of consent. It is to be observed that the exact point in the present case was not before A. L. Smith L.J. in that case.

In *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation* (5) it was held that under the special circumstances of that case the consent of the lessors to an assignment had not been unreasonably withheld.

[POLLOCK M.R. That case seems so special that you will have a difficulty in extracting any general principle from it.]

There the reason given for the refusal was in respect of something quite extraneous to the relation of landlord and tenant, and yet it was held that it was a good ground of objection. The objection there had nothing to do with the contemplated user of the property.

Young v. *Ashley Gardens Properties, Ld.* (6), was a case in which the lessor was endeavouring to enforce a condition which really amounted to a modification of the original lease and to impose a greater burden on the lessee.

It is submitted therefore that there is nothing in any of the

(1) (1874) L. R. 9 Ex. 151, 155.
(2) [1891] 1 Q. B. 417, 423.
(3) (1892) 8 Times L. R. 637.
(4) [1896] 2 K. B. 241.
(5) (1891) 63 L. T. 834.
(6) [1903] 2 Ch. 112.

cases to restrict the meaning of the covenant, as suggested by Tomlin J., and that the Court is entitled to look at all the circumstances of the case. The order appealed from is wrong, and should be reversed.

[They also referred to *In re Winfrey and Chatterton's Agreement.* (1)]

Stamp for the respondents. The real controversy is whether the proviso in the covenant is in gross or whether it is to be construed with reference to the relationship between the parties of landlord and tenant. If the latter you have to find that the objection is in respect to something affecting the property in question and not some other property. There is no case in which it has been held that any extraneous consideration, however beneficial to the lessor, would be sufficient ground of objection. In all the cases cited the matters discussed had relation to the property which was the subject of the lease. Matters foreign to the lease were not suggested in *Treloar* v. *Bigge.* (2) The question there raised had direct reference to the subject matter of the contract. The same is true of *Harrison, Ainslie & Co.* v. *Barrow-in-Furness Corporation.* (3) So too in *Barrow* v. *Isaacs & Son.* (4) There the grounds raised directly touched the subject matter of the contract.

The judgment of A. L. Smith L.J. in *Bates* v. *Donaldson* (5) goes rather further than has been suggested by the appellant. You must find that the reason for the refusal has some bearing on the subject matter of the lease. It is submitted that the test of a good objection is not alone the self interest of the lessor. Here the objection lies wholly outside the scope and subject matter of the lease.

Gavin Simonds K.C. in reply. There is no case directly in point. The clause must be construed as a whole as it stands, and all the circumstances must be taken into consideration. There is nothing in the clause which entitles the Court to qualify the meaning of the word "unreasonably." The

(1) [1921] 2 Ch. 7.
(2) L. R. 9 Ex. 151.
(3) 63 L. T. 834.
(4) [1891] 1 Q. B. 417.
(5) [1896] 2 Q. B. 241.

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difficulty of determining whether a refusal is reasonable or not is not a ground for restricting the circumstances to be taken into consideration.

POLLOCK M.R. This is an appeal from a decision of Tomlin J., given upon an originating summons in which the plaintiffs asked for a declaration that, on the true construction of a lease under which they were lessees, and in the events which had happened, the refusal of the defendant to grant a licence to the plaintiffs to assign the lease to Roneo, Ld., was unreasonable, and, secondly, that, notwithstanding such refusal, the plaintiffs, without any such licence from the defendant, were entitled to assign the lease to Roneo, Ld.

The first question asked by the summons is the real question we have to decide, because it has been held in *Treloar* v. *Bigge* (1) that where there had been an unreasonable refusal on the part of the lessor to allow the lessee to assign, the lessee would be free to assign the premises without the lessor's consent.

It is unnecessary to state the facts at length, because they are stated in the report of the case before Tomlin J. (2) It is only necessary, in order to explain my judgment, to state that the plaintiffs were the lessees under a lease dated September 29, 1908, granted by the defendant of certain premises known as No. 10 Market Street, in the city of Sheffield. The plaintiffs went into possession and have held the premises under that lease, which contains the following covenant: "And the company will not, during the said term, without the consent in writing of the lessor first obtained, assign, sublet, or part with the possession of the hereby demised premises, or any part thereof, such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation." The lessees are now anxious to assign the residue of the term. The lessor has refused his consent, and he has done so candidly and avowedly on the grounds which are stated in a letter to which our attention has been called, and which is in these terms: "I withhold my

(1) L. R. 9 Ex. 151. (2) Ante, p. 198.

consent to Houlder Brothers assigning to Roneo, Ld., on the reasonable ground that by the assignment I should lose Roneo, Ld., as good tenants of No. 12, and because I should have great difficulty in finding any tenant for No. 12 in the present abnormal condition of trade in Sheffield, the loss being rent at the rate of 295*l.* per annum, and probably for a considerable period." The premises which were granted to the plaintiffs under this lease lie contiguous to the premises No. 12, of which Roneo, Ld., are the tenants ; and Roneo, Ld., are the proposed tenants to whom the plaintiffs desire to assign the residue of their term.

The short point, therefore, for us is whether or not the avowed reason of the lessor for withholding his consent—namely, that he will have great difficulty in finding a tenant for No. 12, part of his property, in the present abnormal condition of trade in Sheffield, with the consequent burden of an empty house, and possible loss of rent—is an adequate reason for withholding his consent, within the proviso in the covenant, that his consent is not to be withheld unreasonably in the case of a respectable and responsible person or corporation. It is admitted that Roneo, Ld., fulfil these last conditions, and are a respectable and responsible person or corporation, but it is claimed by the lessor that under that provision, although a respectable and responsible person or corporation is submitted to him as a proposed assignee, he nevertheless has a right to withhold his consent, subject only to the condition that that consent is not unreasonably withheld.

It is unnecessary, I think, to go through the cases, of which there are some half a dozen or more, bearing more or less upon this point, because Tomlin J. has done so, and I agree with his judgment both in its reasoning and in the conclusions at which he has arrived. Indeed I do not desire to add more than a very few words, because I think his judgment is plain and clear, and I have no wish to blur anything that he has said.

It appears to me that in construing the meaning of the words "such consent not to be withheld unreasonably" one

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has to bear in mind that by law in the absence of this covenant the lessees would have had a right to assign the premises as they pleased. The lessor, therefore, took this covenant from the lessees in order to cut down their rights, and to ensure that the premises would not pass into the hands of some person or corporation to whom he could reasonably take objection. Equally, the lessees by accepting the burden of this covenant, on their part, which prevented them from assigning without the leave of the lessor, obtained from him those words in the proviso which cut down the right of the lessor to withhold his consent, and prevented him from acting from caprice, or mere prejudice or the like.

It seems to me useful to call attention to the statement made by Kay L.J. in *Barrow* v. *Isaacs & Son.* (1) He there says: "The terms of the covenant are quite clear. If the intended lessees are respectable and responsible persons the consent is not to be 'arbitrarily withheld.'" It is not contended that there is any difference between "arbitrarily" and "unreasonably." Kay L.J. continues: "Those words simply mean that the consent must be asked for before the assignment, and that it may be withheld, even though the intended lessees are proper persons, if such withholding is not arbitrary. Many cases may be supposed in which it would not be." He then passes on to give instances of cases in which the withholding of consent would not be arbitrary, but those all have reference either to the user of the property, or have some connection with the actual property which is the subject of the contract between the lessor and lessee.

In *Bates* v. *Donaldson* (2) A. L. Smith L.J. says: "It is not, in my opinion, the true reading of this clause that the permission can be withheld in order to enable the lessor to regain possession of the premises before the termination of the term. It was in my judgment inserted alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee, and not in order to enable the lessor to, if possible, coerce a tenant to surrender

(1) [1891] 1 Q. B. 417, 423. (2) [1896] 2 Q. B. 241, 247.

the lease so that the lessor might obtain possession of the premises." His judgment differs, in some important respects, from the judgment which had been delivered by Kay L.J. in the same case. For my part, I agree with A. L. Smith L.J., and I think that one must look at these words in their relation to the premises, and to the contract made in reference to the premises between the lessor and lessee; in other words, one must have regard to the relation of the lessor and lessee inter se, or, perhaps one may add, to the due and proper management of the property, as in *Governors of Bridewell Hospital* v. *Fawkner*. (1) The latter case is an illustration of a withholding of consent on broad grounds bearing upon the estate of the lessor, or it may be on grounds which are important between the lessor and other lessees of that property, or that estate, of which the lessee had cognizance. But I do not think the words of the covenant can be so interpreted as to entitle the lessor to exercise the right of refusal when his reason given is one which is independent of the relation between the lessor and lessee, and is on grounds which are entirely personal to the lessor, and wholly extraneous to the lessee. As an illustration of what I mean I refer to *Young* v. *Ashley Gardens Properties, Ld.* (2), where a condition was imposed, or attempted to be imposed, by the lessor, not in reference to the relation between himself and the lessee, nor in relation to the property which was the subject of the lease, but one which was wholly personal to the lessor himself, whereby he attempted to obtain immunity from possible increase in the rates.

In the present case the lessor has frankly avowed that there is no objection to Roneo, Ld., as a respectable and responsible person or corporation, and that the sole reason operating upon his mind is something extraneous to the relation of landlord and tenant, something extrinsic from the lessee, and something which is wholly personal to the lessor. To hold that such a reason absolved the lessor from the duty of giving his licence to an assignment under the terms of the covenant would, in my opinion, be to

(1) 8 Times L. R. 637. (2) [1903] 2 Ch. 112.

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give far too wide an interpretation to the word "unreasonably," and to be going beyond the cases. While I think it is impossible to give an exact definition which will fit all cases, I prefer the reasoning which is stated by A. L. Smith L.J. in *Bates* v. *Donaldson* (1), which I think has been followed by Tomlin J. I agree, therefore, with the decision which Tomlin J. has reached. For these reasons I think the appeal must be dismissed with costs.

WARRINGTON L.J. I am of the same opinion. The question turns upon the construction of a lease, the plaintiffs being the lessees, and the defendant being the lessor. The lease contained a covenant against assignment, or under-letting, without the consent in writing of the lessor, but that covenant was qualified by these words, "such consent not to be withheld unreasonably in the case of a respectable and responsible person or corporation." The lessor has withheld his consent to an assignment to an admittedly respectable and responsible corporation, a company called Roneo, Ld., and the question therefore is whether he has unreasonably withheld his consent. He has withheld it on this ground: The proposed assignee happens to be tenant to himself of a shop in the same building, and adjoining that which is the subject of the lease, and the lessor is convinced on what I will assume to be sufficient ground, that if the proposed assignee is allowed to take the assignment of the plaintiffs' shop, the subject of the lease, he will give up the other shop, and the lessor will have considerable difficulty in finding a new tenant therefor. It is on that ground that the lessor has refused his consent. That is on a ground having no reference to the personality of the proposed assignee, and having no reference to the effect of the proposed assignment on the user and occupation of the demised premises.

The question whether a particular act is reasonable or unreasonable is obviously one that cannot be determined on abstract considerations. An act must be regarded as reasonable or unreasonable in reference to the circumstances under which it is committed, and when the question arises on the

(1) [1896] 2 Q. B. 241, 247.

construction of a contract the outstanding circumstances to be considered are the nature of the contract to be construed, and the relations between the parties resulting from it. In the present case the contract is a lease, and the relation between the parties that of lessor and lessee.

The first question that arises is: What is the inference to be drawn as to the intention of the parties in inserting in the lease a provision of this kind? What was the danger which the lessor contemplated, and against which the lessee was content to allow the lessor to protect himself? It must, of course, be borne in mind that without this covenant the lessee would have had a free right to assign to whom he pleased the premises comprised in the lease, and the covenant, therefore, was inserted first as a protection of the lessor, and, secondly, the proviso was attached to it in order to prevent the lessor making an unreasonable use of that protection.

Now, what is to be inferred from what may be treated as having been in the contemplation of the parties when the contract was made? I think it must be, as I have said, that it was intended to protect the lessor as against a lessee, who, although respectable and responsible, might well be reasonably objectionable in other ways, and, secondly, from the point of view of the property, to prevent the lessor from having to accept a lessee whose user of the property might again be reasonably objectionable. The user of the property to be reasonably objectionable need not necessarily be objectionable to the lessor as lessor of that particular property. The user of the property might damage the lessor in other ways, and if it did, then an objection to that user would be reasonable; but whichever way it is looked at, I think you must find in the objection something which connects it either with the personality of the intended assignee suggested as the new tenant of the property, or with the user which he is likely to make of the property to be assigned to him.

When you look at the authorities—I do not propose to go through them—this, at any rate, is plain, that in the cases in which an objection to an assignment has been upheld as reasonable it has always had some reference either to the

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personality of the tenant, or to his proposed user of the property. The case which was, perhaps, most relied upon by appellant was that of *Governors of Bridewell Hospital* v. *Fawkner* (1), because what was there apprehended was damage to the lessor in respect of other property of his ; but the damage which was apprehended would have resulted, if it resulted at all, either from the personality of the proposed assignee, who was the General of the Salvation Army, or from the user to which he was likely to put the property, so that it fell within the limitation which I have suggested. I think that even in the judgment of Kay L.J. in *Bates* v. *Donaldson* (2) the same idea is to be found, although he puts it in more general terms. First he says : " I agree, that if the proposed assignee intended to use the house for some purpose to which the landlord might reasonably object, though such purpose was not forbidden by the lease, nor by any rule of law, the landlord might reasonably refuse to permit the assignment." Then there were the words which were much relied upon by the appellant : " So I should think there might be other reasons, personal rather to the landlord than the tenant, which might justify his refusal under the terms of this covenant." In the *Bridewell* case (1) the refusal was personal rather to the landlord than to the tenant, but it had reference to the user by the proposed tenant of the property, and so I think it does not at all follow that Kay L.J. had in contemplation any such objection as that with which we have to deal in the present case. I think the judgment of A. L. Smith L.J. supports the view which Tomlin J. has expressed in his judgment. On the whole, I agree with his judgment, and I think that this appeal ought to be dismissed with costs.

SARGANT L.J. I am of the same opinion. Lately in *In re Winfrey and Chatterton's Agreement* (3) I had to consider this sort of case, and in particular the two rather conflicting judgments of Kay and A. L. Smith L.JJ. in *Bates* v. *Donaldson*. (4) I then expressed a decided preference

(1) 8 Times L. R. 637.
(2) [1896] 2 Q. B. 241, 244.
(3) [1921] 2 Ch. 7.
(4) [1896] 2 Q. B. 241.

for the views of A. L. Smith L.J. I am glad to think that that preference has now been affirmed by the other members of this Court. I should like to point out that the statement in A. L. Smith L.J.'s judgment (1) that "It [i.e., the covenant] was in my judgment inserted alio intuitu altogether, and in order to protect the lessor from having his premises used or occupied in an undesirable way or by an undesirable tenant or assignee," is a general statement, and is not to be read as merely negativing the subsequent sentence, "and not in order to enable the lessor to, if possible, coerce a tenant to surrender the lease so that the lessor might obtain possession of the premises." It seems to me that the learned judge is there laying down, in the first part of the sentence, a major premiss and stating what he thinks are the limits of the clause in question, and that it is merely one of the consequences of that view of those limits that the lessor must not use the clause to coerce the tenant to surrender the lease. I should like also to point out that phrase "alio intuitu" in A. L. Smith L.J.'s judgment is, in my opinion, absolutely applicable, because it recognizes that in considering the operation and effect of a clause of this kind, you have to consider what was within the reasonable contemplation of the parties to the lease.

In the present case Mr. Stamp has shown in his able argument that it is not necessary for the success of the respondent that the operation of the covenant should be limited even to the extent laid down by A. L. Smith L.J.; because Mr. Stamp points out that not only is the reason given here something that is not in relation to the use or occupation of the premises, or to the personality of the tenant, but that the reason has nothing whatever to do with the subject matter of the demise. I was very much impressed by his argument that in a case of this kind the reason must be something affecting the subject matter of the contract which forms the relationship between the landlord and the tenant, and that it must not be something wholly extraneous and completely dissociated from the subject matter of the contract.

(1) [1896] 2 Q. B. 247.

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It is to be noticed that under the statute 32 Hen. 8, c. 34, on an assignment or conveyance of a reversion on a lease, the relationship between landlord and tenant is completely transferred to the new parties. The result of the appellant's view would be that, as the personality of the lessor varied, so the reasons for refusing or withholding the consent to the assignment of the lease might vary, if those reasons might include any circumstance that happened for the time being to affect the pecuniary interest of the lessor.

In the present case the reason for refusing has nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the demise. The sole reason is that if the property is allowed to be assigned to the new tenants, the new tenants, in respect of a tenancy of a completely different property which they hold from the lessor, will probably desire to terminate their tenancy of that other property. In my judgment that is a reason wholly dissociated from, and unconnected with, the bargain made between the lessor and the lessees under the lease that we have to consider, and is, from that point of view, a purely arbitrary and irrelevant reason. I agree with the judgment of Tomlin J., and that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Bell, Brodrick & Gray, for Rodgers & Co., Sheffield.*

Solicitors for respondents: *Ashurst, Morris, Crisp & Co.*

W. I. C.

In re EARL OF STAMFORD AND WARRINGTON.

PAYNE *v.* GREY.

C. A.
1925
May 20.

[1909. S. 156.]

Settled Land—Encumbered Estates—Term vested in Trustees—Trusts for Management and Payment off of Encumbrances—Recoupment of Capital out of Rents and Profits—Application by Tenants for Life to be let in to Possession—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 22, *sub-s.* 2.

Decision of Russell J. (ante, p. 162), so far as it dealt with the construction of an order of Stirling J., dated December 4, 1895, as to recoupment of capital out of rents and profits, reversed.

Appeal from the decision of Russell J. (1)

The seventh Earl of Stamford and Warrington by his will devised his four estates in Staffordshire, Leicestershire, Cheshire and Lancashire, therein called his shire estates, to trustees upon trusts for the benefit of his wife during her life, and after her death he settled them on legal limitations. The testator's widow died on January 20, 1905. Lady Grey and Mrs. Grey were the first tenants for life of the Staffordshire estates and the Leicestershire estates respectively, and, subject to a term of a thousand years, of undivided moieties of the Lancashire estate. At the testator's death all the shire estates were heavily encumbered. The trusts of the thousand years' term were to pay off the encumbrances on the shire estates, other than the Lancashire estate, out of the rents and profits of the Lancashire estate, and when that had been done to pay off the mortgage debts and gross sums charged on the Lancashire estate out of the rents and profits of that estate. When all the encumbrances had been paid off the term of a thousand years was to come to an end. Notwithstanding the term, the trustees had power to sell the Lancashire estate. The trustees were given wider powers of management than those conferred on a tenant for life under the Settled Land Acts, including a power at their discretion to contribute to charitable, benevolent, or public purposes, and to pay

(1) Ante, p. 162.

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pensions, rewards, and gratuities to servants, tenants, and employees of the estate. The power of sale given to the trustees of the thousand years' term enabling them to sell and apply the proceeds in paying off encumbrances on the Lancashire estate in terms contained no provision for recouping capital the amount of encumbrances so discharged out of capital instead of out of rents and profits. On December 4, 1895, an order was made by Stirling J. that the corpus of any shire estate which had been employed in paying off a mortgage on that estate should be recouped out of the rents and profits of the Lancashire estate. He also ordered the trustees, on paying off encumbrances otherwise than out of the rents and profits of the Lancashire estate, to keep the encumbrance on foot for the benefit of the shire estate thereby affected. The practice of the trustees since 1895 had been to take a transfer to special trustees of any mortgage not paid off out of the rents and profits of the Lancashire estate. The encumbrances on all the shire estates except Lancashire had now been paid off.

The summons asked (1.) that the applicants, Lady Grey and Mrs. Grey, who together constituted the person having the powers of a tenant for life under the Settled Land Acts, 1882 to 1890, should be let into possession of the Lancashire estates; (2.) for a declaration that the applicants had power under s. 22, sub-s. 2, of the Settled Land Act, 1882, to direct the application of capital moneys accruing in respect of the said estate and in the hands of the trustees for the time being for the purposes of the Settled Land Acts of the settlement of the said estate in discharging encumbrances on the said estate, and that the trustees were not entitled or bound to keep the encumbrances alive for the benefit of the remaindermen entitled to the said estate or otherwise.

Russell J. held that the applicants were not entitled as of right to be let into possession, and that the most beneficial way of dealing with the Lancashire estate was to refuse the application and continue the trustees in their management, and that, notwithstanding the existence of the term, the applicants could exercise the powers of a tenant for life under

s. 22, sub-s. 2, of the Settled Land Act, 1882. He further held that the order of Stirling J. applied to the recoupment out of rents and profits of the Lancashire estate of any capital of that estate applied in payment off of encumbrances thereon and that therefore the trustees must keep records in their accounts of mortgages so paid off, although they need not take a transfer to special trustees of such mortgages. Except for that order, he would have considered that the provision for recoupment was bad, as it involved accumulation beyond the lawful period.

The applicants appealed from so much of the order as dealt with the continuance of the recoupment directed by the order of Stirling J.

The appeal was heard on May 20, 1925. The only question argued on the appeal was with reference to the construction of the order of Stirling J. of December, 1895. No detailed report of the case therefore appears to be necessary.

Preston K.C. and *G. D. Johnston* for the appellants.

Dighton Pollock for the tenant in fee.

Owen Thompson K.C. and *Swords* for Mrs. Hoare, the first tenant for life in remainder of the Leicestershire estate and of a moiety of the Lancashire estate,

Bennett K.C. and *H. T. Method* for the tenant in tail in remainder, subject to Mrs. Hoare having no children.

P. M. Walters for the second tenant for life of the other moiety of the Lancashire estate.

G. B. Hurst K.C. and *A. L. Ellis* for the plaintiffs.

The Court (POLLOCK M.R., WARRINGTON and SARGANT L.JJ.) allowed the appeal. They held on the construction of the order of Stirling J. that the recoupment thereby directed extended only to the three shire estates—namely, Staffordshire, Leicestershire and Cheshire inter se—and did not apply to recoupment as between tenant for life and remainderman of the Lancashire estate. The trustees were therefore not entitled or bound to keep on foot for the

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benefit of the remaindermen the mortgages on the Lancashire estate which had been paid off out of the capital of that estate.

Solicitors: *Smith, Fawdon & Low, for Wright, Woodrow & Aysom, Leicester; Bower, Cotton & Bower; Maples, Teesdale & Co., for Lord & Parker, Worcester; Peake, Bird, Collins & Co.*

W. I. C.

EVE J. 1925 *May* 20, 26.

GOODCHILD *v.* ROBERTS.

[1924. G. 1434.]

Solicitor—Bills of Costs—Charge—Taxation—"Disbursements"—Counsels' Fees—Moderation of Bills—Practice—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *s.* 37—*Solicitors Act*, 1860 (23 & 24 *Vict. c.* 127)—*Rules of the Supreme Court*, 1883, *Order* LXV., *r.* 27, *regs.* 26, 29 (*a*).

The plaintiff deposited two leases with the respondent, his solicitor, and by a written instrument charged his interest in the two messuages comprised therein as security for the repayment of certain sums advanced to him by the respondent, and for all costs, charges and disbursements incurred by him in an action for the plaintiff. An order was made for an account of what was due to the respondent under the deposit and agreement. Various bills were delivered, some of which were directed to be taxed and two were referred to be moderated. In one of these there were included as disbursements counsels' fees to the amount of 22*l.* These had not been paid, but there was no note to that effect, nor were they set out under a separate heading in the bill in accordance with Order LXV., r. 27, reg. 29 (*a*). The fees were in fact paid before the bill was submitted for moderation, and were ultimately allowed by the taxing Master. On a summons by the plaintiff to vary the report of the taxing Master:—

Held, that reg. 29 (*a*) of Order LXV., r. 27, only applied to a taxation under the Act of 1843, and according to *In re Eden* [1920] 2 K. B. 333 was held not to extend to a taxation of the costs, charges and expenses of a solicitor applying for a charging order under the Solicitors Act, 1860; nor could it apply to the case of moderation of a bill which was not the same as taxation: *Johnson* v. *Telford* (1827) 3 Russ. 477; *Allen* v. *Jarvis* (1869) L. R. 4 Ch. 616; and *Earl of Aylesford* v. *Earl Poulett* (1890) 63 L. T. 519, 520.

Held, therefore, that there was here no taxation under the Act of 1843 or otherwise, and the summons would be dismissed with costs.

THIS was a summons by the applicant, Thomas Goodchild, that his objections dated January 30, 1923, to certain bills of costs of the respondent referred for moderation might be allowed, and that it might be sent back to the taxing Master to vary his report accordingly. In February, 1922, the plaintiff had retained the defendant, Theodore Roberts, to act as his solicitor in connection with certain proceedings and matters then pending, and he so acted until May 3, 1924. One of the matters on which the defendant so acted was an action between the plaintiff and Messrs. White & Poore. In the course of his acting for the plaintiff the defendant lent him two sums of 125*l.* and 90*l.* on the security of an equitable charge dated December 16, 1922, upon two valuable leasehold dwelling-houses, 11 and 18 Marchmont Street, Holborn. This charge was also to secure himself for all costs, charges and expenses incurred by the plaintiff with him. Certain bills of costs were delivered and ordered to be taxed and two others were referred to be moderated. In one of these counsels' fees for 22*l.* had been charged; these had not been paid before the delivery of the bill, but were paid before the submission to moderation. The proceedings before the Master and the grounds of objection to his allowing these fees sufficiently appear from the judgment of the Court.

Gover K.C. and *Swords* for the applicant. The applicant's objection to the allowance of these fees is that they had not been paid at the date of the delivery of the bills, and that the terms of Order LXV., r. 27, sub-reg. 26, applied and reg. 29 (*a*) has not been complied with. The principles applicable to the moderation of bills appear in *Medlicott* v. *Hubbard* (1), and the taxation should be on the basis of an ordinary taxation. The taxing Master relied on the analogy of the Solicitors Act, 1860, which deals with a taxation under a charging order: *In re Eden.* (2) These payments for counsels' fees were "disbursements": *Sadd* v. *Griffin.* (3) But in the present case the counsels' fees had not been paid

(1) (1888) 32 Sol. J. 258. (2) [1920] 2 K. B. 333.
(3) [1908] 2 K. B. 510.

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before the delivery of the bill, and should be disallowed. The taxation is not within the Act of 1860, and comes within reg. 26 of Order LXV. They also relied on *In re Hildesheim.* (1)

Roope Reeve K.C. and *G. D. Johnston* for the defendant. The decision of the taxing Master was right. "Moderation" is different from taxation, and these counsels' fees were in fact paid before the bills were submitted for moderation. *Sadd* v. *Griffin* (2) was distinguished in *In re Eden.* (3) The bill could not be taxed under the Act of 1843 unless there were special circumstances. Here on the applicant's own submission it was sent for moderation, there were no special circumstances for the taxing Master to decide. Reg. 29 (*a*) is in terms applicable only to a taxation under the Solicitors Act of 1843. This is not such a taxation. The only thing the Court has to consider is whether the taxing Master is to be overruled when he has allowed the mortgagee these sums. Our submission is that his decision should not be interfered with.

Gover K.C. in reply.

May 26. EVE J. delivered the following written judgment. The object of this summons is to vary the report of the taxing Master upon a bill of costs sent to him for moderation in the following circumstances.

In the year 1922 the applicant, Mr. Thomas Goodchild, retained the respondent, Mr. Theodore Roberts, as his solicitor in an action brought against certain individuals, and thereby incurred a bill of costs amounting to 100*l.* or thereabouts. On December 16 in the same year he deposited two leases with the respondent, and by an instrument in writing charged his interest in the two messuages comprised therein as security for payment to the respondent of the sums therein mentioned and of all costs, charges and expenses incurred by him with the respondent.

By an order made on July 4, 1924, in this action

(1) [1914] 3 K. B. 841. (2) [1908] 2 K. B. 510.
(3) [1920] 2 K. B. 333.

(commenced in the King's Bench Division, but afterwards transferred to the Chancery Division), it was ordered that an account should be taken of the amount due to the respondent by virtue of the said deposit and agreement, and when the respondent brought in as part of the account five bills of costs, three of which had been delivered within the preceding twelve months and two (including the one under review) at earlier dates, the Master who was taking the account requested the taxing officer to tax the three first mentioned bills and to report and advise as to any particular items in the other two to which exception might be taken by the applicant. In other words he referred the three bills to be taxed and the other two to be moderated.

When the bill under review was delivered there was included in it as "disbursements" counsels' fees to an aggregate amount of 22*l*. These fees had not then been paid, but there was no statement to that effect in the bill, nor were they set out under a separate heading in the bill. They were in fact paid before the bill was submitted for moderation, and the taxing Master has allowed them.

The applicant objects to this allowance on the ground that it is contrary to reg. 29 (*a*) of Order LXV., r. 27, which provides that in taxations under or pursuant to the Solicitors Act, 1843, of a solicitor's fees, charges and disbursements, no such disbursements shall be allowed which have not been actually made before the delivery of the bill, unless the bill shall expressly state that they have not then been made and shall set out such unpaid disbursements under a separate heading of the bill. The regulation, it is to be observed, applies only to taxations under or pursuant to the Act of 1843, and accordingly in *In re Eden* (1) was held not to extend to a taxation of the costs, charges and expenses of a solicitor applying for a charging order under the Solicitors Act, 1860. Nor, in my opinion, can it apply to a case for moderation of a bill. That is not the same as taxation: *Johnson* v. *Telford* (2) and *Allen* v. *Jarvis* (3), but is a very different

(1) [1920] 2 K. B. 333. (2) 3 Russ. 477.
(3) L. R. 4 Ch. 616.

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thing: see per North J. in *Earl of Aylesford* v. *Earl Poulett.* (1)

In these circumstances there was no taxation here under the Act of 1843, or otherwise, and the summons to review cannot succeed, and must be dismissed with costs.

Solicitors for plaintiff: *Reid Sharman & Co.*
Solicitor for defendant: *Theodore Roberts.*

G. M.

ASTBURY J.
1925
March 11;
May 5, 6, 7.

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[1924. A. 1179.]

Local Government—Street—Building beyond Front main Wall of adjoining House—Subsequent written Consent of urban Authority—Public Health (Buildings in Streets) Act, 1888 (51 & 52 *Vict. c.* 52), *s.* 3.

Building By-law—Uncertain—Unreasonable—Air Space—Hilly Site—Site Open to Sea and public Park—Plans complying with Minister of Health's Regulations and Conditions—Approval by Building Committee of urban Authority—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 158, 200—*Housing, Town Planning, &c., Act*, 1919 (9 & 10 *Geo.* 5, *c.* 35), *ss.* 25, 40—*Expiring Laws Act*, 1922 (12 & 13 *Geo.* 5, *c.* 50)—*Ministry of Health (Temporary Relaxation of Building By-Laws) Regulations*, 1922—*St. R. & O.* 1922, *No.* 1035.

The Public Health (Buildings in Streets) Act, 1888, s. 3, provides that it shall not be lawful "without the written consent of the urban authority" to erect any building in any street beyond the front main wall of the building on either side.

On December 10, 1923, plans for a hotel were approved by the building committee of an urban authority without their attention being drawn to the fact that the proposed building would infringe the section, and on the faith of that approval the building was commenced on December 16. On May 12, 1924, when a substantial portion had been erected, and after a complaint by an adjoining owner raising the exact point, the urban authority gave a written consent to the hotel being erected beyond the front main wall of the adjoining house.

In an action by the Attorney-General for a mandatory injunction to restrain the breach of the section:—

Held, that there was a sufficient written consent within the section and no breach.

London County Council v. *Cross* [1892] W. N. 80; 66 L. T. 731;

(1) 63 L. T. 519.

Reg. v. *London County Council* (1897) 61 J. P. 439; and *Kerr* v. *Preston Corporation* (1876) 6 Ch. D. 463 distinguished.

Held, also, in the circumstances, that in no case ought a mandatory injunction to be granted.

Sect. 157 of the Public Health Act, 1875, enables an urban authority to make by-laws with respect to: (1.) Construction of new streets; (2.) Structure of new buildings; (3.) Air space and ventilation of buildings; (4.) Drainage of buildings.

In March, 1923, an urban authority adopted certain by-laws under this section, which were sanctioned in May.

By-law 7, cl. 1, provided that any person erecting a new domestic building should provide in the rear an open space of 150 square feet exclusively belonging to that building, extending throughout the entire width, and with a minimum distance of 20 feet across for a building between 25 and 35 feet high. The open space, at least for that distance, was to be free from any erection above the level of the ground except a watercloset, earthcloset, privy or ashpit. Clause 4 provided that the height of the building was to be measured upwards "from the level of the ground over which such open space shall extend."

Sect. 25 of the Housing, Town Planning, &c., Act, 1919, which was continued to December 31, 1923, by the Expiring Laws Act, 1922, provides that notwithstanding any "building by-laws," a local authority may consent to the erection and use for human habitation of any buildings erected in accordance with regulations made by [the Minister of Health, formerly] the Local Government Board, and by s. 40 the expression "building by-laws" includes by-laws made under s. 157 of the Public Health Act, 1875, with respect to new buildings, including the drainage thereof, and new streets.

On September 16, 1922, the Minister of Health made regulations providing that a local authority, notwithstanding any building by-laws, might up to December 31, 1923, consent to the erection, etc., of any building complying with the conditions in the Schedule, which were mainly as to construction and materials, and did not touch the question of air space.

In September, 1923, the defendant bought a site for a hotel on the parade at Lyme Regis. This site faced the sea on the south, and ran back 50 feet to the north. The land in its natural state ran up the side of a hill, but a large portion, going back 40 feet, had already been excavated to the parade level. The remaining 10 feet strip on the hill at the north was bounded by a public park. This park was also the west boundary, but between it and the excavation was a piece of hilly ground, which the defendant had undertaken to use as his private garden.

The plans prepared by the borough surveyor showed the hotel going back 28 feet with a back annex up to the second floor containing a heating chamber, bathrooms and waterclosets. This annex, which was 13 feet wide, went back another 10 feet. The height of the hotel, if measured from the bottom of the excavation, was 34 feet.

On December 10, 1923, the Building Committee, appointed under s. 200 of the Public Health Act, 1875, for the purposes of that Act, which by s. 158 include enforcing the observance of by-laws, duly

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passed the plans (which in fact complied with the Minister of Health's conditions), and the building proceeded accordingly.

In the same action by the Attorney-General for a mandatory injunction to restrain the breach of by-law 7:—

Held, that by-law 7 was a building by-law within s. 25 of the Housing, Town Planning, &c., Act, 1919, and consequently, notwithstanding that by-law, the Building Committee had full power to consent to the erection of a building complying with the Minister of Health's conditions.

Held, also, that as applied to hilly ground the by-law was uncertain, as it gave no indication how the ground level was to be ascertained for such a site.

Held, also, that as applied to a site facing the open sea and bounded on the back and one side by a public park the by-law was unreasonable.

Kruse v. *Johnson* [1898] 2 Q. B. 91 and *Repton School Governors* v. *Repton Rural Council* [1918] 2 K. B. 133 applied.

Attorney-General v. *Friary, Holroyd and Healy's Breweries* (1907) 71 J. P. 348 and *Yabbicom* v. *King* [1899] 1 Q. B. 444 distinguished.

Held, also, in the circumstances, that in no case ought a mandatory injunction to be granted.

WITNESS ACTION.

This was an action by the Attorney-General at the relation of two ratepayers of the borough of Lyme Regis for a declaration that the Bay Hotel now in course of erection by the defendant contravened s. 3 of the Public Health (Buildings in Streets) Act, 1888, and also contravened by-law 7 of the borough by-laws, and for an injunction and mandatory order.

Sect. 3 provides that "it shall not be lawful in any urban district, without the written consent of the urban authority, to erect or bring forward any house or building in any street, or any part of such house or building, beyond the front main wall of the house or building on either side thereof in the same street. . . . . Any person offending against this enactment shall be liable to a penalty not exceeding 40 shillings for every day during which the offence is continued after written notice in this behalf from the urban authority."

On March 12, 1923, the Lyme Regis Corporation, in pursuance of s. 175 of the Public Health Act, 1875, adopted certain by-laws, which were allowed by the Minister of Health on May 9, 1923. They provided as follows:—

By-law 7, cl. 1. "Every person who shall erect a new domestic building intended to be used wholly or partly for human habitation shall provide in the rear of such building

an open space exclusively belonging to such building, and of an aggregate extent of not less than 150 square feet.

He shall cause such open space to extend throughout the entire width of such building, and he shall cause the distance across such open space from the line of the rearmost wall of such building to the boundary of any lands or premises immediately in the rear of the site of such building to be not less in any part than 15 feet.

If the height of such building is not less than 25 feet but is less than 35 feet he shall cause such distance to be 20 feet at the least.

If the height of such building is not less than 35 feet he shall cause such distance to be 25 feet at the least.

He shall cause such open space, at least for the distance hereinbefore required, to be free from any erection thereon above the level of the ground, except a watercloset, earth-closet, or privy, and an ashpit constructed respectively in accordance with the by-laws in that behalf.

In any case where by reason of the exceptional shape of the site of such building the minimum distance across the open space required by this by-law cannot be obtained throughout the entire width of such building, it shall suffice if the mean distance across such open space be not less than the minimum distance so required. . . . ."

Clause 4. " For the purposes of this by-law the height of such building shall be the height of the highest portion of the building, measured upwards from the level of the ground over which such open space shall extend to the level of half the vertical height of the roof or to the top of the parapet, whichever may be the higher."

The street in question ran east and west along the sea front. The main wall of relator A.'s house, " The Sundial," was set back 10 feet from the street. Relator B.'s house, " Library Cottage," adjoined it on the east.

In September, 1923, the defendant bought a site on the parade with the view of building a hotel. This site was immediately on the west of relator A.'s house. It ran back north to a depth of 50 feet, its north boundary being a public

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park. The land in its natural state ran up the side of a hill at a slope of about 40 degrees, but a large portion next to relator A.'s house had already been excavated to the level of the parade. This excavation was held up on the north by two curved retaining walls 40 feet back, with their concavities towards the south.

The south boundary was the parade abutting on the sea. The west boundary was again the public park, but between that park and the excavation was a piece of hilly ground, which the defendant had undertaken to use as his private garden.

The plans, which were prepared by McDonnell, the borough surveyor, showed the hotel with about 60 feet frontage set back only 2 feet from the street and going back to a depth of about 28 feet. Behind this was an annex up to the second floor containing a heating chamber, bathrooms and water-closets. This was 13 feet wide, and went back 10 feet close to the near end of one retaining wall.

The height of the hotel to the middle of the roof (if measured from the bottom of the excavation) was 34 feet, and the bottom of the roof was about level with the top of the retaining walls, beyond which the ground sloped upwards to the public park.

The plans did not show the position of the buildings immediately adjoining the proposed hotel, as required by by-law 45, so as to indicate that any infraction of s. 3 was proposed, but in all other respects they were complete, showing clearly (inter alia) the air space proposed to be left, and the building committee, who knew the site intimately, duly passed them on December 10, 1923, and stamped them as approved accordingly.

On the faith of this approval a building contract was entered into, and the building was commenced on December 16, 1923.

On March 29, 1924, relator A., who on March 11 had objected that the hotel would interfere with his light and air, raised the question as to the infringement of s. 3 and by-law 7, but offered to withdraw his objections if a corner of the

hotel was cut off, so as not to interfere with his view. The building had, however, proceeded so far that this course was impracticable.

On May 12, 1924, after these points had been raised, the Corporation gave a written consent to the hotel being erected beyond the front main wall of relator A.'s house, adding that this has nothing whatever to do with any action of the building committee.

On May 14 the necessary papers were laid before the Attorney-General, and on May 24 he gave his fiat for this action, which was commenced on June 2, when the hotel had reached the third, i.e., the top floor.

Luxmoore K.C. and *Randolph Glen* for the Attorney-General. There are two distinct points—namely, the breach of the 1888 Act and the breach of by-law 7. They must be dealt with separately.

First as to the statute. This hotel clearly contravenes s. 3 of the 1888 Act, as it is 8 feet in front of our main wall.

[ASTBURY J. The building committee passed the plans on December 10, 1923, before the building was commenced, and the Corporation subsequently gave a written consent under s. 3 on May 12, 1924.]

The building committee had no power to consent to this breach, even if the plans had shown it. But the plans did not show it, so there was no consent in fact. In *Mullis* v. *Hubbard* (1) the point appeared on the plans, and they were approved by the urban authority on December 3, 1900, before the building was commenced in January, 1901. In the present case the Corporation's written consent was too late. The statutory offence was committed by the erection of the building without their previous consent. They could not waive or condone this statutory offence: *London County Council* v. *Cross* (2); *Reg.* v. *London County Council* (3); *Kerr* v. *Preston Corporation.* (4)

(1) [1903] 2 Ch. 431; 72 L.J.(Ch.) 593.
(2) [1892] W. N. 80; 66 L. T. 731, 736.
(3) 61 J. P. 439.
(4) 6 Ch. D. 463, 468.

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The Attorney-General can obtain a mandatory injunction against breach of a statute without proof of actual injury to the public: *Attorney-General* v. *Cockermouth Local Board* (1); *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (2); *Attorney-General* v. *Wimbledon House Estate Co.* (3); *Attorney-General* v. *Parish* (4); and it is his sole province to determine whether he ought to take action: *London County Council* v. *Attorney-General.* (5)

Secondly as to by-law 7. The ground level in cl. 4 is here the bottom of the excavation, which is level with the parade. The height being therefore 34 feet requires an open space in the rear of 150 square feet and a minimum depth of 20 feet. The back land on the slope of the hill cannot be reckoned for either purpose: *Attorney-General* v. *Friary, Holroyd and Healy's Breweries* (6), and the by-law is clearly infringed in both respects. It is in any case infringed by the building of the annex, which is not within the encroachments allowed on the open space. The by-law has the force of an Act of Parliament in the locality: *Hopkins* v. *Swansea Corporation* (7), and cannot be waived by the Corporation: *Yabbicom* v. *King.* (8)

[ASTBURY J. Is there any case of a manadatory injunction being granted after approval of plans by the local authority ?]

This was done in *Attorney-General* v. *Folkestone Corporation.* (9)

Ward Coldridge K.C. and *Wilfrid Hunt* for the defendant. First as to the statute. Failure to remove the building after notice is a necessary part of the compound statutory offence under s. 3 of the 1888 Act: *Mullis* v. *Hubbard.* (10) Otherwise there is no complete offence.

[ASTBURY J. I am prepared to hold that there was an inchoate offence, which might have become an actual offence if the Corporation had not consented. But they did consent.]

(1) (1874) L. R. 18 Eq. 172.
(2) (1882) 21 Ch. D. 752.
(3) [1904] 2 Ch. 34, 44.
(4) [1913] 2 Ch. 444, 453.
(5) [1902] A. C. 165, 168.
(6) 71 J. P. 348.
(7) (1839) 4 M. & W. 621, 640; (1841) 8 Ibid. 901.
(8) [1899] 1 Q. B. 444.
(9) [1873] W. N. 127.
(10) [1903] 2 Ch. 431, 435, 436.

In those circumstances the Court, which has an absolute discretion in the matter, ought not to grant a mandatory injunction: *Attorney-General* v. *Wimbledon House Estate Co.* (1); *Attorney-General* v. *Birmingham, &c., Drainage Board.* (2)

Secondly as to the by-law. These by-laws were made under s. 157 of the Public Health Act, 1875, which provides for by-laws under four heads—namely: (1.) Construction of new streets; (2.) Structure of new buildings; (3.) Air space and ventilation of buildings; (4.) Drainage of buildings.

Now s. 25 of the Housing, Town Planning, &c., Act, 1919, which was continued to December 31, 1923, by the expiring Laws Act, 1922, provides that notwithstanding any building by-laws a local authority may consent to the erection and use for human habitation of any buildings erected in accordance with regulations made by the Local Government Board, and by s. 40 the expression "building by-laws" includes by-laws made under s. 157 of the Public Health Act, 1875, with respect to new buildings, including the drainage thereof and new streets.

On September 16, 1922, the Minister of Health, to whom the Local Government Board's powers were transferred by the Ministry of Health Act, 1919 (9 & 10 Geo. 5, c. 21), s. 3, made certain regulations, providing that a local authority, notwithstanding any building by-laws, might up to December 31, 1923, consent to the erection and use for human habitation of any building complying with the conditions in the Schedule: see Ministry of Health (Temporary Relaxation of Building By-laws) Regulations, 1922, St. R. & O., 1922, No. 1035. The conditions in the Schedule were mainly as to construction and materials, and were all complied with. They did not touch the question of air space.

The building committee, who were appointed under s. 200 of the Public Health Act, 1875, for the purposes of that Act, which by s. 158 include seeing to the observance of by-laws, duly passed the plans, and that was a sufficient consent under the Relaxation Order. That is a complete answer to the case on by-law 7.

(1) [1904] 2 Ch. 34, 42. (2) [1910] 1 Ch. 48, 53, 59, 61.

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Suppose, however, that by-law 7 was not relaxed, it is both unreasonable and uncertain in its application to a site of this nature. A by-law must be reasonable and certain: *Kruse* v. *Johnson*. (1) As applied to a site fronting the sea and abutting on a public park it is surely unreasonable. As applied to hilly ground it is quite uncertain, as cl. 4 gives no indication how the ground level is to be ascertained. This difficulty was foreseen and avoided in the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.). Sect. 5, sub-s. 8, provides that "The expression 'level of the ground' means the mean level of the ground, as determined by the district surveyor . . . ." The provisions as to open spaces in the rear of domestic buildings are in s. 41.

In *Repton School Governors* v. *Repton Rural Council* (2) this very by-law was held unreasonable as applied to a front addition to an existing building.

In *Attorney-General* v. *Friary, Holroyd and Healy's Breweries* (3) the objection of unreasonableness was not taken before the magistrates or the Divisional Court, and Warrington J. held himself bound by their finding.

Luxmoore K.C. and *Randolph Glen* in reply. First as to the statute. An ex post facto consent is nugatory: *Reg.* v. *London County Council* (4); *Stevens* v. *National Telephone Co.* (5)

The Corporation's consent cannot be treated as a ratification of the building committee's consent for two reasons. In the first place they expressly purported to give an original consent, adding that it had nothing to do with any action of the building committee. Secondly, at the time of the supposed ratification they were not legally capable of giving their own consent: see *Firth* v. *Staines*. (6)

The Court is not bound to grant a mandatory injunction, but it must consider the nature of the breach. In *Attorney-General* v. *Birmingham, &c., Drainage Board* (7) the defendants

(1) [1898] 2 Q. B. 91, 108.
(2) [1918] 2 K. B. 133, 137, 139, 140.
(3) 71 J. P. 348.
(4) 61 J. P. 439.
(5) [1914] 1 I. R. 9; L. R. Dig. (1911–20), col. 3544.
(6) [1897] 2 Q. B. 70, 75.
(7) [1910] 1 Ch. 48, 55, 59.

were actually doing good to the river. Here the defendant is only benefiting himself.

Secondly, as to the by-law. Unless by-law 7 was relaxed it is clearly infringed. It is said to have been relaxed under s. 25 of the Town Planning, &c., Act, 1919. But that section obviously relates to a housing scheme under s. 24, and does not apply here. Again it is not a building by-law within s. 40, which only refers to heads 1, 2 and 4 of the Public Health Act, 1875, s. 157—namely, new streets, new buildings, and drainage, and not to head 3—namely, air space and ventilation. Again the building committee were acting under the Public Health Act, 1875, and non constat that they intended to exercise any powers under the Town Planning, &c., Act, 1919. These powers are quite distinct: compare *Burgess* v. *Northwich Local Board*. (1)

As to the alleged unreasonableness of by-law 7 the *Repton School* case (2) has no bearing, as the adoptive s. 23 of the Public Health Acts Amendment Act, 1907 (7 Edw. 7, c. 53), on which it turned is not in force in Lyme Regis.

ASTBURY J. [after stating the facts]. There are two totally separate matters to be considered: First, whether there has been a breach of s. 3 of the Public Health (Buildings in Streets) Act, 1888; and, secondly, whether this building contravenes by-law 7 of 1923 as to ventilation and air space at the back and, if so, whether that by-law is reasonable, certain and valid as applied to this building.

Sect. 3 is as follows. [His Lordship read the section and continued:] No written notice against continuing the alleged offence was given in the present case, and the question is whether the defendant's building is a house unlawfully erected within the meaning of this section. It is perfectly plain that the real object of this section is to give the urban authority, here the Corporation, the right to control the line of the streets under their jurisdiction and to prevent, contrary to their will and without their written consent, the erection or building of a house which contravenes the section. In this

(1) (1880) 6 Q. B. D. 264, 276. (2) [1918] 2 K. B. 133.

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case the building committee, without having their attention drawn to the difference in the front main wall of the proposed building and that on the side of it, knowing what was going to be done or what was proposed to be done, came to the conclusion that this house was a house the plans of which they ought to approve. They did approve them, and the defendant proceeded with his erection on the faith of having obtained the consent, as he thought, of the Corporation. Now the building committee in fact had no power to give a written consent within the meaning of this section, but the Corporation, as soon as their attention was drawn to the dispute, gave their written consent to this house remaining erected and being completed. In my judgment, that was amply sufficient to prevent there having been in the circumstances any infraction of the section or any unlawful building thereunder.

I have been pressed with the argument that the true meaning of this section is that no person shall "commence" the erection of any building without the written consent of the Corporation, and there is one case in which, under perfectly different circumstances, that question was considered. Such a construction might lead to the most amazing results and injustice. In my opinion, it would be wholly wrong in the present case, having regard to the facts that I have stated, to grant a mandatory order to pull down this house, because the Corporation, whether they were aware of its erection throughout or not, did, as soon as their attention was drawn to the fact, ratify and give their written consent to that which had been and was proposed to be done. The provision as to penalties in this section seems to me to throw some light upon this question. Of course, I assent to the proposition that in a proper case an injunction may be granted, but it is to be observed that a person does not offend against this section so as to be liable to any penalty unless and until written notice objecting to the building is given by the Corporation.

I will now refer very shortly to the authorities cited on the first point, s. 3.

The first is *London County Council* v. *Cross* (1), a case under s. 75 of the Metropolis Management Act, 1862 (25 & 26 Vict. c. 102). That seems to me to throw no light upon the question I have to decide. It does not in any way deal with the question whether a consent may be given after the commencement of the building. Kay L.J. said: "The view which I take of the provisions in the statute is, that the offence is committed when the man begins to build his house beyond the building line without the consent of the local authority," and so on. In that case there never was a consent. The offence was in fact committed and necessarily dated from the commencement of the building.

In *Reg.* v. *London County Council* (2) it was decided that: "Mandamus will not lie to the London County Council to compel them to hear and determine an application for their consent to the erection of a building at less than the prescribed distance from the centre of the roadway of a street (being a highway), when such application has not been made until after the building has been erected at less than the prescribed distance without such consent." That again is a case in which no consent was ever given, and therefore an offence had technically been committed. It was tried before the Divisional Court, and it is quite true that Hawkins J. expressed his view that an ex post facto consent would not do, and that it would be the ratification of an illegality, and he states that in his view the consent under the Act there being discussed (London Building Act, 1894, s. 13) meant a consent before the erection of the building in question began. Wright J. did not express any similar opinion, and both judges decided that case in fact on the ground that the council were under no duty to give an answer one way or another when applied to ex post facto for their consent, and could not be compelled by mandamus to consider the matter. In that case, having regard to what took place, the building was throughout an unlawful building within the section, and with the exception of certain expressions of opinion by Hawkins J. the decision has nothing to do with the question in this case.

(1) [1892] W. N. 80; 66 L. T. 731, 736. (2) 61 J. P. 439.

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In *Kerr* v. *Preston Corporation* (1) it was decided that a board having statutory power to consent in writing to a particular act is not bound by its tacit acquiescence in such act. That again does not touch the question before me.

Authorities were then cited to show that in an action of this character the Attorney-General need not prove injury or damage. In *Attorney-General* v. *Shrewsbury* (*Kingsland*) *Bridge Co.* (2) an injunction was granted, although no evidence of actual injury was given.

In *London County Council* v. *Attorney-General* (3) Lord Halsbury said: "One question has been raised, though I think not raised here—it appears to have emerged in the Court below—which I confess I do not understand. I mean the suggestion that the Courts have any power over the jurisdiction of the Attorney-General when he is suing on behalf of a relator in a matter in which he is the only person who has to decide those questions. It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first law officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of law to intervene?" That does not really seem to me to help very much, because nobody suggests that the Attorney-General has not acted perfectly properly in the present case.

There are also cases where it is said that prima facie in an Attorney-General's action of this character, if a breach of the law is proved, an injunction follows as a matter of course. That is laid down and explained in *Attorney-General* v. *Wimbledon House Estate Co.* (4), the clearest passage being (5): "The Attorney-General has brought to the attention of the Court the fact that there has been a clear and deliberate breach of the duty imposed by a public statute, and in my

(1) 6 Ch. D. 463, 468.
(2) 21 Ch. D. 752.
(3) [1902] A. C. 165, 168.
(4) [1904] 2 Ch. 34, 41, 44.
(5) [1904] 2 Ch. 44.

opinion the mandatory injunction follows as a matter of course." In the present case, of course, there has been no deliberate breach, and, in my judgment, no breach at all of s. 3. So much for the point on that section.

The second point is concerned with by-law 7, which deals with the free circulation of air and the ventilation of buildings. [His Lordship read by-law 7, clauses 1 and 4, and continued:] Here again several authorities have been cited.

In *Attorney-General* v. *Friary, Holroyd and Healy's Breweries* (1) a brewery company erected certain outbuildings on land belonging to them, adjoining their hotel, with stables and yard, by sufficiently excavating a steep bank sloping down to the highroad to enable them to place the buildings on the level of the highroad. The back wall of these buildings was built right up across the portion of the bank remaining unexcavated, and the top of the bank was now about one foot higher than the level of the back wall of the new buildings. The rural council refused to approve plans of these buildings, as contravening the by-laws under the Public Health Acts. The company having nevertheless erected the buildings, were convicted by the justices for a breach of the by-laws and fined. A case was stated for the opinion of the High Court, which affirmed the conviction. An action was then brought for an injunction to restrain the company from continuing to contravene the by-laws. Warrington J. held that the council were in the circumstances entitled to the injunction, the construction of the by-laws having been already determined by a Court of co-ordinate jurisdiction. That is the only case cited where the building objected to was built on a hill site. No question of the unreasonableness or uncertainty of the by-law was raised, and Warrington J. had no alternative but to grant the injunction, the construction and validity of the by-law having been previously decided. The case seems to decide that a hill behind a building is not an open space within the meaning of the by-law. Warrington J. says (2): "The argument is that open space means a space free from buildings and nothing more. If this matter were

(1) 71 J. P. 348. (2) 71 J. P. 350*a*.

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entirely free from authority and open for my decision, I should express the same opinion as to the by-law as that expressed by the Divisional Court, and hold that the defendants' contention fails. But I doubt if it is open to me to do so."

In *Yabbicom* v. *King* (1) it was decided that an approval of plans contrary to by-laws is unlawful and of no effect, and that the local authority can, notwithstanding the same, take proceedings for breach, they having no dispensing power.

That is in substance the argument on the authorities, and I will now deal with the by-law question.

Sect. 25 of the Housing, Town Planning, &c., Act, 1919, provides that "Notwithstanding the provisions of any building by-laws"—and in my judgment by-law 7 is a building by-law—"a local authority may, during a period of three years from the passing of this Act, consent to the erection and use for human habitation of any buildings erected or proposed to be erected in accordance with any regulations made by the Local Government Board."

The Minister of Health, to whom the Local Government Board's powers were transferred by the Ministry of Health Act, 1919, s. 3, did make such regulations. They are only concerned with the structure of buildings. They do not touch the question of air space. I think that this section was probably passed in view of the many difficulties that had arisen in connection with by-laws framed in general language and not providing for particular cases giving rise to difficulties previously unforeseen.

It gives the local authority during a period subsequently extended to December 31, 1923, power to consent to the erection of buildings in accordance with the Minister of Health's regulations. The present building complies with those regulations.

Sect. 25, sub-s. 2, provides that "The local authority may attach to their consent any conditions which they may deem proper with regard to the situation, sanitary arrangements, and protection against fire of such buildings, and may fix

(1) [1899] 1 Q. B. 444.

and from time to time extend the period during which such buildings shall be allowed to be used for human habitation."

Sect. 40 provides that "The expression 'building by-laws' includes by-laws made by any local authority under s. 157 of the Public Health Act, 1875, as amended by any subsequent enactment, with respect to new buildings including the drainage thereof and new streets."

These by-laws were made under s. 157, which provides that "Every urban authority may make by-laws with respect to the following matters: (that is to say,)

(1.) With respect to the level width and construction of new streets, and the provisions for the sewerage thereof:

(2.) With respect to the structure of walls foundations roofs and chimneys of new buildings for securing stability and the prevention of fires, and for purposes of health:

(3.) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings:

(4.) With respect to the drainage of buildings. . . . ."

The Attorney-General contends that s. 25 of the Housing, Town Planning, &c., Act, 1919, on which the defendant relies, does not apply to this case at all, but is dealing primarily with a housing scheme under s. 24. He also contends that the building by-laws as defined by s. 40 are confined to those dealt with in sub-ss. 1, 2 and 4 of s. 157 of the Public Health Act, 1875, and do not include those in sub-s. 3. I think, however, that the question of air space around a building for the purpose of circulation and ventilation is a matter connected with the building of the premises, and that as far as the by-laws were concerned the Corporation had power to consent to the erection of this hotel.

Now s. 200 of the Public Health Act, 1875, provides that "Every urban authority may from time to time appoint out of their own number so many persons as they may think fit, for any purposes of this Act which in the opinion of such authority would be better regulated and managed by means of a committee."

The building committee were appointed under that section,

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part of their duties clearly being to see to the enforcement of the building by-laws, and if I am right on the true construction of s. 25, this case fails on the by-law point.

But the case does not end there.

In *Kruse* v. *Johnson* (1) Mathew J. said: "From the many decisions upon the subject it would seem clear that a by-law to be valid must, among other conditions, have two properties—it must be certain, that is, it must contain adequate information as to the duties of those who are to obey, and it must be reasonable."

The defendant contends that by-law 7 is uncertain and unreasonable, and therefore invalid in the present case. Before I state the grounds of that contention I will refer shortly to *Repton School Governors* v. *Repton Rural Council* (2), where this model by-law was considered. The headnote states that "the plaintiffs proposed to build an addition to the front of one of the school boarding-houses consisting of a projection containing three rooms one above the other. By s. 23 of the Public Health Acts Amendment Act, 1907, this addition was deemed to be a 'new building' for the purposes of the Public Health Acts, and any by-laws made thereunder. The defendants refused to approve the plans, as the proposed addition would infringe one of their by-laws, which provided that 'every person who shall erect a new domestic building shall provide in the rear of such building an open space exclusively belonging to such building, and of an aggregate extent of not less than 150 square feet."—That is by-law 7.—"The plaintiffs contended that the by-law was unreasonable because it was impossible to provide an open space at the rear of a new building which consisted of an addition to an existing building:—Held that the by-law was unreasonable and therefore bad." It is unnecessary to discuss the absurdity that would have resulted in that and similar cases with regard to additions to buildings if that by-law had been valid. Pickford L.J. said (3): "It is an important case, because it affects a very great number of by-laws

(1) [1898] 2 Q. B. 91, 108. (2) [1918] 2 K. B. 133.
(3) [1918] 2 K. B. 137.

throughout the country. I quite agree that by-laws, especially those of public bodies, should be approached from the point of view of upholding them, if possible, and should be, as it has been described, benevolently interpreted; but still they must be reasonable. I think Bailhache J. has stated the considerations to be applied quite accurately as follows: 'One may certainly add this—that if the effect in a given case, which might be of frequent occurrence, of construing a by-law in a particular way would lead to a result quite unnecessary for the protection of the public health, and would impose a serious restriction upon the ordinary rights of a property owner with no good object, I think one would be entitled to say that the by-law was void because it was unreasonable.'" Then Pickford L.J. considered the effect of the Public Health Acts Amendment Act, 1907, which gave rise to the difficulty in that particular case, and said (1): "I think that a by-law which prohibits additions of this kind, where no good object could be served by doing so, because it contains requirements framed for other purposes and inapplicable to these circumstances, is so unreasonable as to be invalid." Later on he said (2): "The result is that I think this by-law applies to all additions which are new buildings as defined by the Public Health Acts Amendment Act, 1907; and, as applied to such additions, it is so unreasonable as to be ultra vires." The other Lords Justices came to the same conclusion.

I have therefore to decide whether this by-law, having regard to the particular circumstances, contains "requirements framed for other purposes and inapplicable to these circumstances."

This hotel is built on the side of a hill, with a large open park behind. On the west beyond the hotel garden is the same public park; in front is the sea, and it is hardly denied that the hotel has quite as much air and ventilation as is good for it. The space scooped out from the hill contains two lighting areas. The Attorney-General seeks to measure the height of the hotel under by-law 7, cl. 4, from the bottom

(1) [1918] 2 K. B. 139. (2) [1918] 2 K. B. 140.

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of these lighting areas. That in fact is not the level of the ground at all. The level of the ground, apart from these lighting areas, is shown on certain plans, and it is quite impossible, having regard to the particular character of the lighting areas, to say what is in fact the level of the ground within the by-law. It may be half a dozen levels. This point was not raised or decided in *Attorney-General* v. *Friary, Holroyd and Healy's Breweries.* (1)

An experienced architect called by the defendant says that he has found over and over again that this by-law cannot function in hilly places, and special provisions have to be made, as the by-law becomes unintelligible in its application to such places. He says that in this particular case there is more than ample air space and ventilation. By way of rebutting evidence the Attorney-General called an architect with no experience in hilly country. He said he had never had to face a difficulty like this, but he thought there was abundant air circulation and ventilation at the back of the hotel, and that the back areas on which the Attorney-General relied for his level were mere lighting areas.

Now just consider what happened in this case. The building committee were the proper people to consider this question. They considered it. They discussed the difficulties in detail, including the question of ventilation and air space. They knew the premises, and they passed the plans. On the faith of that the building was erected. The by-law requires 150 square feet of space to be left at the back. The borough surveyor says that there is an open space of 1434 square feet, and that the plans comply with the by-law so far as it is intelligible, and that he prepared them with that view, and that there is ample circulation, ventilation and air space.

Just imagine for a moment applying a by-law intended to ensure free circulation of air and ventilation of buildings to a hotel with the sea in front of it, a large public park at the back and the same park on the west of the hotel garden. It is almost ludicrous to suppose that the circulation of air

(1) 71 J. P. 348.

and ventilation is not more than ample, as several witnesses testify.

If then the Attorney-General's construction of the by-law is correct—namely, that the level of the ground means the bottom of the air spaces—the by-law in this case would lead to a result quite unnecessary for the protection of public health, and would impose a serious restriction upon the ordinary rights of the defendant with no good object at all. If on the other hand the true construction is that the level ought to be taken from the level of the natural ground as distinct from the level of these air shafts, no difficulty arises.

The Attorney-General relies upon one further matter. By-law 7 provides that the builder "shall cause such open space, at least for the distance hereinbefore required, to be free from any erection thereon above the level of the ground, except a watercloset, earthcloset, or privy, and an ashpit." There again it is wholly doubtful what is the level of the ground. What the defendant has done is to build out certain bathrooms and waterclosets with a heating apparatus at the bottom for heating the hotel. If the Attorney-General's view of the level of the ground is right, that part of the by-law is broken, because however useful waterclosets, earthclosets, and privies, and ashpits may be, the same reason does not seem to apply to bathrooms. If the defendant's view of the meaning of the level of the ground is right, there is little or no infraction of this provision. As far as these by-laws are concerned the plans were properly submitted and approved; the hotel was built on the faith of that approval, and as no one can conceivably be legally injured or the public health endangered by the erection of this hotel, I am of opinion that in no case ought an injunction to be granted.

Before leaving the case I should point out that there are many other matters in respect of which this by-law makes no provisions for circumstances like these. It makes all sorts of provisions as to spaces to be left where there are streets in front or at the back or the side of a building, but there is no provision where at the back of the building there

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is a large park, or at the side a garden abutting on a large park, and in my judgment many of the provisions of this by-law are wholly inapplicable to the circumstances of this case; the object for which it was passed, to establish ventilation and circulation of air, has in no way been infringed except in words, and cl. 4 is so uncertain that I am unable to place any construction upon it as applying to this case.

I am of opinion therefore that s. 3 of the Public Health (Buildings in Streets) Act, 1888, has not been infringed; that the by-law, if not in fact relaxed by the Minister of Health's regulations, is in any case too uncertain for me to give effect to it in this case; that on one construction there is no infringement, and on the other it is wholly unreasonable.

The Attorney-General's case therefore fails on both points, and must be dismissed with costs to be paid by the relators.

Solicitors: *Robins, Hay, Waters & Hay; Sewell, Edwards & Nevill.*

G. R. A.

LAWRENCE J. 1925 *March* 18.

GARRARD *v.* JAMES.

[1924. G. 1299.]

Guarantee—Shares as Security for Loan to Company—Agreement by Company to repurchase Shares—Ultra vires—Guarantee for performance of Contract by Company—Effect of Unenforceability of Contract against Company upon Liability of Guarantors.

The plaintiff, with the view to assist his son-in-law in obtaining the appointment of business manager of a limited company of which the two defendants were directors and shareholders, entered into a written agreement with the company and the defendants to advance to the company a sum of 1500*l.* by the purchase of 1500 1*l.* preference shares of the company, the repayment of that sum being secured by the company's undertaking, in the event of the plaintiff or his son-in-law terminating that agreement, to procure the repurchase of the shares at par and to secure the purchase money therefor by accepting bills drawn by the plaintiff: and in that arrangement the two defendants joined as sureties guaranteeing the due performance by the company of its part of the agreement.

The plaintiff, accordingly, advanced 1500*l.* to the company, and accepted transfers from the company of the same number of its preference

shares. Upon the son-in-law desiring to withdraw from the manager-ship, the plaintiff in pursuance of a power in that behalf contained therein gave the company notice to terminate the agreement and required the company to procure the repurchase of the shares and to accept his bills for 1500*l.*; but the company refused to comply with those requirements and denied liability under the agreement on the ground that the performance of it would involve a purchase by the company of its own shares, and would therefore be ultra vires and illegal. In an action against the defendants under their guarantees:—

Held, that the agreement, having been entered into between the parties in good faith and in the honest belief that it was intra vires and legal, the defence that the agreement was, upon the grounds above mentioned, ultra vires the company and therefore unenforceable could not be maintained; and that, therefore, the plaintiff was entitled to judgment for 1500*l.* with interest.

The decision of Kay J. in *Yorkshire Railway Wagon Co.* v. *Maclure* (1881) 19 Ch. D. 478 applied.

ACTION.

In September, 1923, the plaintiff Frank Rochfort Garrard, being desirous of setting up in business his son-in-law D. K. Bourne, and willing to provide money for that purpose, got into touch with the defendant Mr. E. F. James, who with the other defendant, Mr. R. Wood, and one Copeland were directors and shareholders of a private company known as James & Copeland, Ld. (hereinafter called "the company"), which carried on the business of import and export merchants. Negotiations ensued between the plaintiff's and the defendants' respective solicitors, with the view to Mr. Bourne entering into the employment of the company as their manager for a probationary period and to the plaintiff advancing to the company 1500*l.* against the transfer to him by the company of 1500 1*l.* shares and to secure the repayment of that sum, in the event of the failure by the company to repurchase the shares, by the personal guarantees of the defendants: and, eventually, as a result of those negotiations two agreements were entered into, the first of them being an agreement dated October 26, 1923, and made between D. K. Bourne and the company, whereby it was agreed that Bourne should enter the employment of the company as manager for nine months, the agreement to be terminable by either party at the end of three, six or nine months from October 22, 1923. The other agreement (which was afterwards cancelled in favour of another

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substituted agreement) was an agreement of the same date and supplemental to the first agreement, and made between the company, D. K. Bourne and the plaintiff, whereby it was agreed that the plaintiff should take up 1500 preference shares of 1*l.* each in the company; and that, if the agreement was terminated by the plaintiff under the power thereby reserved to him, the company would forthwith accept bills for 1500*l.* to be drawn upon them by the plaintiff, payable three months after date and that, upon payment of such bills, the plaintiff would transfer the shares to the company: and the defendants E. F. James and R. Wood and Copeland signed guarantees for the proper performance of the obligations of the company under that agreement.

In pursuance of that agreement and in reliance on the provisions and guarantees contained therein the plaintiff, on October 26, 1923, paid 1500*l.* to the company and was allotted by the company 1500 8*l.* per cent. cumulative preference shares of 1*l.* each in the company.

On December 2, 1923, Copeland died, and another agreement was on January 4, 1924, entered into between the company, the two defendants, Bourne and the plaintiff, whereby the supplemental agreement of October 26, 1923, was cancelled, and by cl. 4, in consideration of the purchase of the 1500 preference shares already made by the plaintiff, the company covenanted with the plaintiff as follows: To guarantee the punctual payment to him of the cumulative 8 per cent. preferential dividend on the shares and, if the new agreement should be determined by the plaintiff or by Bourne at any time before February 1, 1925, by giving fourteen days' notice in writing to the company, to procure the repurchase from the plaintiff or his nominee at par of the 1500 shares within three calendar months from the date of the notice, so determining the agreement; and in order to secure such repurchase, immediately on receipt of such notice, to accept bills for 1500*l.* to be drawn upon the company by the plaintiff payable three months after date, and upon payment of the bills at maturity or upon any previous taking up thereof by the company the plaintiff or his nominee

was to execute such transfers of the shares as the company might require, and by cl. 5 for the consideration aforesaid the defendants jointly and severally covenanted with the plaintiff to guarantee the full and proper performance by the company of the covenants on its part thereinbefore mentioned, and, in the event of default being made by the company under its covenants, to accept liability and to guarantee the said payments to the plaintiff.

On February 29, 1924, the plaintiff in pursuance of the agreement gave notice to the company of his intention to terminate the agreement and also sent a bill for 1500*l.* drawn upon the company with a request that the company would return the bill accepted. In consequence of the company's failure to find a purchaser for the shares and their refusal to accept the bill on the ground that the agreement was bad and also of the defendants' repudiation of any personal liability under their guarantees, the plaintiff issued the writ in this action against the sureties claiming specific performance by them and each of them of their covenants to accept the bill or damages in lieu thereof. The defence set up was that the agreement by the company was ultra vires and illegal, inasmuch as it involved the payment by the company of dividends out of capital and the purchase by the company of its own shares.

Jenkins K.C. and *Charles R. R. Romer* for the plaintiff. The plea set up by the defendant sureties cannot prevail. It is no answer to the plaintiff's claim to say that the sureties' principals exceeded their powers. We admit that, if the company had purchased or agreed to purchase the shares from the plaintiff, the plaintiff would not be entitled to recover the price from the company or enforce the agreement: *Trevor* v. *Whitworth.* (1) But there is no provision in the Companies Act, 1908, which expressly prohibits a company from purchasing its own shares. Since the decision in that case, it has been recognized that a company may purchase its own shares provided it proceeds by way of reduction of

(1) (1887) 12 App. Cas. 409.

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capital under the Act. The guarantors here are not entitled to set up the plea that the company would, in the cases we have put, not be bound. By the agreement the guarantors undertake direct liability, if in point of fact the company fail to perform its part. The guarantees of the defendants formed an essential part of the contract between the plaintiff and the company. The decision of Kay J. in *Yorkshire Railway Wagon Co.* v. *Maclure* (1), reversed on appeal on the facts so far as regarded the liability of the principals (2), covers this case. And in *Chambers* v. *Manchester and Milford Ry. Co.* (3) Blackburn J.'s judgment clearly indicates that he was of opinion that the mere fact that the plaintiff debtor is able to avoid liability on the ground of ultra vires does not affect the liability of the surety. There is a broad distinction between a case of mere incapacity and a case of fraud : *Swan* v. *Bank of Scotland* (4) and *Macgregor* v. *Dover and Deal Ry. Co.* (5) are distinguishable from the present case on the ground that in those cases the debt was void for illegality.

Owen Thompson K.C. and *Buckmaster* for the defendants. Upon the true construction of the guarantee the defendants are not liable. They are only liable " in the event of default being made by the company under its covenants " : " default " there means not doing that which the company can lawfully do. There can be no default by the company owing to its incapacity to perform : it does not make default through its non-performance of that which, if performed, would be void. A purchase by the company of its own shares would be a void act ; if the company had no power to do so, it could not be said to make default. In *Swan* v. *Bank of Scotland* (4), Lord Brougham, in considering the question from a more general point of view, considered that " a provision making void the transaction is quite as clear a ground of nullity, and quite as strong to defeat all legal remedy as any such prohibition," that was, statutory prohibition : there was no legal remedy when the provisions of a statute operated by

(1) 19 Ch. D. 478.
(2) (1882) 21 Ch. D. 309.
(3) (1864) 5 B. & S. 588, 612.
(4) (1836) 10 Bli. (N. S.) 627, 633.
(5) (1852) 18 Q. B. 618.

declaring void what was prohibited. The statute in that case made void the bond: if there was no debt for which the bond was given as security through the bank being forbidden any claim against its customer, there was no liability incurred by the obligors under their bond. The obligors there were held not liable under their bond, because the statute had rendered the transaction void. The sureties there were exonerated on the ground that there was no debt in respect of which the bond could operate. In *Macgregor* v. *Dover and Deal Ry. Co.* (1) the contract was that a company should do an illegal thing, and it was held to be void, and on that ground unenforceable. It is stated as the opinion of the learned editors in a note to form 600 at p. 1191 of Part I. of the 12th ed. of Palmer's Company Precedents, that the decision of Kay J. in *Yorkshire Railway Wagon Co.* v. *Maclure* (2) cannot be relied upon having regard to the decision of the Court of Appeal in the same case. (3)

LAWRENCE J. In this case the plaintiff claims payment from the two defendants under the terms of an agreement of January 4, 1924, of a sum of money provided by the plaintiff on the occasion of his son-in-law, Mr. Bourne, entering into the business of import and export merchants carried on by a private limited company of which the two defendants were directors and shareholders. The circumstances under which the agreement was entered into are not in dispute, and are, shortly stated, as follows: [His Lordship then stated the circumstances which led up to the agreement of January 4, 1924, and proceeded:] There is not the slightest doubt, upon the documents, that the plaintiff provided the money in order to enable his son-in-law to become a manager in the business of the company on the faith of the promise made by the defendants, who were largely interested in the concern, that should his son-in-law desire to withdraw from the company, the money so provided should be paid back to the plaintiff. It was pointed out by the solicitors who were then

(1) 18 Q. B. 618. (2) 19 Ch. D. 478.
(3) 21 Ch. D. 309.

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acting for the defendants that an agreement by the company to purchase the shares on the withdrawal of the son-in-law would be ultra vires, and thereupon the agreement of January 4, 1924, was drawn up and was agreed to by all parties acting in good faith and in the belief that it was intra vires and valid. It was of the essence of the bargain that the defendants should guarantee the repayment to the plaintiff of the money which he was providing for his son-in-law in the event of the company not finding a purchaser for the shares or not meeting the bills. Unfortunately the company was attempting to contract in a way which, it is now admitted, was beyond its powers. It is important to observe that the company committed no statutory offence by entering into the agreement and that the transaction was not malum in se. The only result was that the agreement could not be enforced against the company. The defendants, however, as an essential part of the transaction, jointly and severally covenanted with the plaintiff (1.) to guarantee the full and proper performance by the company of the covenants on its part contained in the agreement, and (2.) in the event of default being made by the company under its covenants, to accept liability and to guarantee the payments to the plaintiff in such manner, as if the covenants contained in cl. 4 of the agreement had been repeated in the covenants with the defendants. In my opinion, the true meaning of the covenant on the part of the defendants is that, if the company does not perform its obligations under the agreement, the defendants will themselves perform those obligations. The first branch of the covenant is, in my judgment, sufficient to entitle the plaintiff to succeed in this action. But I also think that the second branch applies to the facts of this case. The word "default" is a word of wide general import, and includes "failure" and "omission." It seems to me immaterial whether the failure or omission by the company to perform its obligations is attributable to its financial inability or to statutory disability, as the liability of the defendants arises, whatever may be the cause of failure. The gist of the bargain entered into by the defendants, in my

opinion, was: "If you, the plaintiff, will advance this 1500*l.*, we, the defendants, will pay you, if the company does not pay."

It is said, however, that there are decisions binding on this Court which prevent the Court from giving effect to what, I think, is in accordance with the plain honesty of the transaction. In my opinion, there are no such decisions. On the contrary, I am glad to think that two such eminent judges as Blackburn J. and Kay J. have expressed the opinion that such a bargain as was made by the defendants here can be enforced. In *Chambers* v. *Manchester and Milford Ry. Co.* (1) the question for decision was whether a bond which had been given for money borrowed by a railway company was valid and enforceable, and it was held that it was void as against the railway company, as the sum borrowed was in excess of the borrowing powers conferred by the special Act and the Companies Clauses Consolidation Act, and that the holder could not recover. The facts there were different from the facts of the present case: but in the course of his judgment Blackburn J. deals with the case of a surety, as the plaintiff in that case had by signing a joint promissory note become co-surety for the loan. The learned judge says (2): "When the note became due the bank had a right to come upon him and the co-surety, but he could not have sued the company for money paid to their use: he paid it to discharge a loan which was not contracted by the company in compliance with the restrictions imposed by their Act." In other words, the learned judge's opinion was that, notwithstanding that the company had exceeded its borrowing powers and that therefore the bank could not have enforced payment of the loan from the company, and the surety, after payment of the loan, could not recover the money paid by him from the company, the surety was, nevertheless, liable to the lender.

In *Yorkshire Railway Wagon Co.* v. *Maclure* (3) a railway company being advised that it had no power to borrow, entered into a transaction which Kay J. held did, in fact,

(1) 5 B. & S. 588. (2) Ibid. 612.
(3) 19 Ch. D. 478.

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amount to a borrowing. The learned judge decided that, although the transaction was ultra vires and void as against the railway company, the guarantee which had been given by the three directors was, nevertheless, valid, and that they were liable under it. The following passage taken from the judgment is directly applicable to the facts of the present case (1): "Mr. Maclure was chairman of the company throughout this transaction, and his defence, to say the least of it, is startling. It is not less so because the solicitors of the company, who seem to have advised the directors that the transaction was legal and right, as appears by the minutes of the 6th April, 1876, are the solicitors on the record for Mr. Maclure in this action. It was argued by his counsel that, looking to the effect on the debenture holders, the transaction was malum in se, and language was used which seemed to me at the time not only strange on his behalf, but utterly unwarranted by the facts of the case. I see no reason for believing that the directors did anything malum in se. They conceived they had hit upon a lawful mode of evading the Acts of Parliament, and seem to have been so advised." Then the learned judge, after quoting the passage which I have already cited from the judgment of Blackburn J., decided that, in the circumstances of that case, which are strictly analogous to the circumstances here, that the guarantee was enforceable. The case went to the Court of Appeal (2), and that Court took a different view of the facts, and held that the transaction was not a borrowing, but expressed no dissent from the view taken by Kay J. as to the liability of the sureties, had the transaction been what he had held it to be. The two cases which have been cited on behalf of the defendants are, in my opinion, distinguishable on the facts. Taking them in order of date, the first is *Swan* v. *Bank of Scotland* (3), where a bank having opened an account in favour of a customer, allowed the customer to draw unstamped documents, notwithstanding that he was drawing at a distance of more than ten miles from the bank premises and notwithstanding that the documents were

(1) 19 Ch. D. 490. (2) 21 Ch. D. 309. (3) 10 Bli. (N. S.) 627.

post dated, and the bills, when they were drawn, were not truly specified. The bank having obtained a guarantee from the customer's friends for the amount which might from time to time be owing on the account, had made itself a party to an arrangement with the customer under which he would not only commit a fraud on the revenue, but would also do acts which were not only expressly forbidden and made void by the statute, but which involved both the customer and the bank in penalties. It would seem strange if the bank, having become a party to these illegal transactions involving a direct breach of the law every time a fresh credit was granted to the customer, after having purged its offences by paying penalties, could have successfully claimed that the guarantor was liable for the amount of the customer's overdraft which had arisen from transactions which the statute had expressly enacted should be null and void. In my opinion, the facts in that case are very different from the facts in the present case, and that case is inapplicable here.

The second case is *Macgregor* v. *Dover and Deal Ry. Co.* (1), where the agreement which was sought to be enforced was an agreement made by a person interested in the South Eastern Railway Company, whereby he purported to agree that the railway company should do certain things and make certain payments, which were illegal and contrary to public policy. There was no question of guaranteeing the repayment of a sum of money which had been bona fide advanced to the company: it was a simple agreement that the company should do an illegal act. It is not surprising that, in those circumstances, the agreement was held to be not enforceable. In my opinion, the decision in that case has no application to the present case. In the result, for the reasons stated, I hold that the plaintiff is entitled to judgment for 1500*l.* with interest at 5*l.* per cent. from October 1 until payment, the plaintiff undertaking to transfer to the defendants the shares against payment.

Solicitors: *Bell, Brodrick & Gray; Ranger, Burton & Frost.*

(1) 18 Q. B. 618.

TOMLIN J.

1925

May 14, 15, 29.

LONDON COUNTY COUNCIL *v.* HUTTER.

[1924. L. 2378.]

Landlord and Tenant—Breach of Lessee's Covenant—Mandatory Injunction—Affixing of Electric Advertisement to Outside of Premises.

The plaintiffs were successors in title of the original lessors and the defendant was a successor in title of the original lessee under a lease dated March 6, 1886, by which premises were let for a term of eighty years at the yearly rent of 350*l*. The lease contained a covenant not without the consent of the lessors, their successors and assigns to "cut or maim any of the principal walls or timbers of the building . . . . or commit or permit any waste or damage to the said building or to the floors or timbers thereof or make or permit to be made any alteration in the elevation of the building or in the architectural decoration thereof. . . . ."

The defendant had installed (without the plaintiff's consent) on the façade of the building an electric light advertisement set in a large iron framework round the whole frontage of the building. The framework was bolted to and supported by twelve T irons and eleven iron brackets, all of which were cemented into holes cut in the stonework of the wall of the building. Twenty-three holes had been cut for this purpose, each hole being about 2¼ inches square and 6 inches deep. The advertisement was let for advertising a make of gin, and the defendant received payments for its display. The advertisement had no connection with any business carried on by the defendant or his under-tenants on the premises:—

Held, that the fixing of the T irons and iron brackets in the stonework in this manner was a breach of the covenant in the lease and that the plaintiffs were entitled to a mandatory order for their removal.

Joseph v. *London County Council* [1914] W. N. 204; 111 L. T. 276 distinguished.

WITNESS ACTION.

By a lease dated March 6, 1886, the Metropolitan Board of Works demised to one Robert Edwin Villiers a piece of land situated at the corner of Piccadilly and Shaftesbury Avenue in the County of London, together with the building erected thereon and known as the Piccadilly Restaurant, for the term of eighty years from March 25, 1885, at the yearly rent of 350*l*.

The lease contained a covenant by the lessor for himself his heirs executors and administrators and assigns with the lessees their successors and assigns, which so far as material is in the following terms:—

"That the lessee his executors, administrators or assigns will not during the said term without the previous written consent of the lessors their successors or assigns cut or maim any of the principal walls or timbers of the building for the time being on the land hereby demised or commit or permit any waste or damage to the said building or to the floors or timbers thereof or make or permit to be made any alteration in the elevation of the buildings or in the architectural decoration thereof. . . . ."

The plaintiffs as the statutory successors and assigns of the Metropolitan Board of Works were entitled to the freehold reversion in the premises expectant on the determination of the lease, and the defendant had become by virtue of divers assignments entitled to the leasehold premises for all the unexpired residue of the term of eighty years, subject to the payment of the rent reserved by the lease and the observance and performance of the lessee's covenants and conditions.

The building had a frontage to both Shaftesbury Avenue and Piccadilly Circus with a rounded off corner at the junction of the two streets. The defendant had (without the plaintiffs' consent) installed on the façade of the building on both frontages an electric light advertisement set in a large iron framework, which was about 75 feet long and 10 feet high, and ran round the whole frontage of the building at the level of the top floor. The framework was bolted to and supported by twelve T irons and eleven iron brackets, all of which were cemented into holes cut in the stonework of the wall of the building. Twenty-three holes had been cut for this purpose, each hole being about $2\frac{1}{4}$ inches square and 6 inches deep. One of the holes had been cut through the architrave of the window on the rounded corner overlooking Piccadilly Circus. The electrical advertisement related to a make of gin, and the defendant received payments for its display. The advertisement had no connection with any business carried on by the defendant or his under-tenants on the premises.

The plaintiffs alleged that the installation of this advertisement in this manner involved a breach of the above

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covenant and claimed (1.) a declaration that the framework constituted a breach of the covenant; (2.) a mandatory order for the removal of the framework and the making good of the principal walls and timbers of the building so far as they had been cut or maimed or otherwise damaged by its erection.

Gavin Simonds K.C. and *Attwater* for the plaintiffs. The framework is a breach of the lessee's covenant in so far as it has involved cutting into the principal walls. There has been a breach in respect of each branch of the covenant. The defendant has cut or maimed the principal walls by making these holes in the stonework, has committed or permitted damage to the building, and has permitted an alteration in the elevation and the architectural decoration of the building.

Further the framework has been erected for the purpose of letting it out as an advertisement station. At present it is occupied by an advertisement of a certain gin, which has no connection with any business being carried on on the premises. The alteration involved was not therefore reasonably incidental to the ordinary user of the premises, so as to come within the exception recognized in *Bickmore* v. *Dimmer*. (1) This case is distinguished from *Joseph* v. *London County Council* (2), where the sign in question was not attached to the premises by irons embedded in the walls, but hung from the upper part of the premises.

Greene K.C. and *Sir A. Underhill* for the defendant. There has not been any breach of the covenant on its true construction. The word "maim" involves serious injury. The word is applied to buildings by analogy to the human form and means an injury that renders the part of the body affected unable to perform its ordinary functions: see Stroud's Judicial Dictionary, p. 1136. "Cut" being used in conjunction with "maim" must have a correspondingly serious meaning. Here the injuries to the building are trivial. Further there has been no "waste or damage" within the

(1) [1903] 1 Ch. 158, 166. (2) [1914] W. N. 204; 111 L. T. 276.

meaning of the covenant. The damage intended to be covered is damage of the nature of waste and not trivial damage: compare *West Ham Central Charity Board* v. *East London Waterworks Co.* (1) Further there has been no alteration to constitute a breach of the covenant against any alteration of the elevation: *Joseph* v. *London County Council.* (2) A tenant's covenant not to alter premises must be construed either by custom or by way of exception, so as not to exclude any alteration reasonably necessary for some permitted user of the premises: *Bickmore* v. *Dimmer* (3); *Hyman* v. *Rose.* (4) The lessee in this case is entitled under the lease to carry on the business of illuminated signs, and for this purpose he was therefore permitted to erect this framework.

[TOMLIN J. The defendant is not carrying on an advertising business, but is allowing the building to be used by others as an advertisement station.]

In considering whether there has been a breach of covenant the Court has to visualise not the electric sign and iron framework, but two rows of holes 9 feet apart, the holes in the upper row being some 7 feet apart and those in the lower row about 6 feet apart. How can it be said that this amounts to an alteration of the elevation or to a breach of any part of this covenant?

Simonds K.C. in reply. The defendant has clearly committed a breach of the covenant on its true construction. The attempt to limit the meaning of "cut" and "damage" by reference to the respective words with which they are coupled is not justified. The intent was to cover by the covenant a small or a serious injury. The covenant has to be construed reasonably, and there has here been both a cutting and a causing of damage to the building.

Further there has been an alteration in the elevation, and the principle applied in *Bickmore* v. *Dimmer* (3) has no application. All that case decided was that a covenant not

(1) [1900] 1 Ch. 624, 635.
(2) [1914] W. N. 204; 111 L. T. 276.
(3) [1903] 1 Ch. 158, 166.
(4) [1912] A. C. 623, 631, 632.

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to alter must be treated as subject to a qualification that it is not to prevent any alteration reasonably incidental to that business which in the contemplation of both lessor and lessee has to be carried on there. Moreover there is no ground for placing any such qualification on the construction of a covenant not to cause "damage." The only possible qualification in such a case is that the Court will not intervene where the principle "De minimis non curat lex" applies. That is not so in this case.

Cur. adv. vult.

May 29. TOMLIN J. This is an action by the London County Council as lessors of a building known as the Piccadilly Restaurant against the assignee of the lease of the premises, claiming a declaration that a framework carrying an electric sign installed on the façade of the building constitutes a breach of certain covenants in the lease and for an order for the removal of the framework and for the making good of the damages caused by the installation thereof. [His Lordship then stated the facts with regard to the erection of the framework and the manner in which it was attached to the building and continued:] It is not clear whether all the holes were cut for the purpose of erecting the present structure. Most of them were undoubtedly so cut, but some of them may have been cut in the first instance in connection with a previous advertising sign on the removal of which the plaintiffs successfully insisted. At any rate all the cutting of the stone and the embedding therein of the T irons and brackets have been done or permitted by the defendant. The framework is not used for advertisement or otherwise in connection with any business carried on by the defendant or his under-tenants on the premises. It is the advertisement of a stranger which the defendant permits to be displayed on the front of the building.

The lease under which the defendant holds is dated March 6, 1886, and is for a term of eighty years from March 25, 1885, at a rent of 350*l.* per annum. The lease contains full repairing covenants on the part of the lessee and also

a covenant by the lessee in the following terms: "The lessee his executors, administrators or assigns will not, during the said term, without the previous written licence of the lessors, their successors or assigns, cut or maim any of the principal walls or timbers of the building for the time being on the land hereby demised, or commit or permit any waste or damage to the said building or to the floors or timbers thereof or make or permit to be made any alteration in the elevation of the building or in the architectural decoration thereof."

The covenant is divisible into three branches; first, a covenant not to cut or maim any of the principal walls or timbers of the building; secondly, a covenant not to commit or permit any waste or damage to the building or to the floors or timbers thereof; and thirdly, a covenant not to make or permit to be made any alteration in the elevation of the building or in the architectural decoration thereof. The plaintiffs contend that there has been a breach of the covenant in each of its branches. Now the stonework of the wall has been cut, and there have been embedded in and cemented into the holes so cut in the stone twenty-three T irons and iron brackets, and if the framework of the sign were unbolted and removed, these irons and brackets would remain as a permanent addition to the fabric of the buildings unless cut out, and if cut out would leave the stonework holed and deteriorated. The cutting of the stone has been done not for any purpose reasonably necessary or incidental to the ordinary use and occupation of the premises as a house of residence or business, but to enable the outside wall to be used as an advertising station. I think this is a breach of the first branch of the covenant. Further, it is, I think, plain that what has been done has actually damaged to some extent the stonework of the wall and is a breach of the second branch of the covenant. With regard to the third branch of the covenant, a covenant in identical terms contained in a lease of premises on the opposite side of Shaftesbury Avenue was considered by Astbury J. in *Joseph* v. *London County Council*. (1) The act complained of in that case was the

(1) [1914] W. N. 204; 111 L. T. 276.

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suspension in front of the building of an electric sign without any cutting into or interference with the structure of the building, and the learned judge held that alteration in the elevation of the buildings or the architectural decoration thereof related only to alterations to the fabric of the building and did not cover alterations to its appearance by temporary advertisements hung outside, which could be removed at any time. There has been in the present case, by the operations I have described, an appreciable alteration in the fabric of the front of the building, and the moulding round one of the windows has been cut through. I do not think the principle upon which Astbury J. proceeded applies here. In my opinion it can fairly be said that there has been within the meaning of the covenant not only an alteration in the architectural decoration by the cutting through of part of the architrave (and for this purpose it does not seem to me to matter whether the defendant caused the cutting through to be done to enable the existing sign to be erected or permitted it on the former occasion), but also an alteration in the elevation of the building by the cutting of holes in the stone, and the permanent embedding therein of the T irons and iron brackets. Further, the alteration is not one which was reasonably incidental to the ordinary user of the premises, and cannot, in my opinion, fall within any such exception as is illustrated in *Bickmore* v. *Dimmer*. (1)

I shall, therefore, make a declaration that the operations by which the T irons and iron brackets were fixed in the stone of the walls of the buildings, and the retention of such irons and brackets as so fixed, constitute breaches of the covenant, and that the defendant is bound to remove the irons and brackets and is liable to make good the damage to the buildings occasioned by the fixing and removal of the same. There will be a mandatory order for the removal of the irons and brackets, and the defendant must pay the costs of the action.

Solicitors: *David Palmer Andrews; Lane & Cottier.*

(1) [1903] 1 Ch. 158.

H. C. G.

EVE J.
1925
April 24;
May 26.

In re HACK.

BEADMAN *v.* BEADMAN.

[1925. H. 129.]

Will—Construction—Copyholds—Devise for Life with Remainder to "heir-at-law"—Rule in Shelley's Case—Customary Fee Simple.

By his will a testator, among other devises of freeholds and copyholds, devised his two copyhold houses, gardens, and premises situate in the parish of B., and also a piece of copyhold land adjoining, to his nephew G. B. for life without impeachment of waste, and after his death he devised the same premises to the "heir-at-law" of the said G. B. There was no special custom of descent in the manor of B. affecting these copyholds:—

Held, that the use of the expression "heir-at-law" did not exclude the operation of the rule in *Shelley's Case* (1581) 1 Rep. 93*b*, which accordingly applied, and G. B. was entitled in customary fee simple for an estate to him and his heirs according to the custom of the manor.

THE terms of the will are taken from the judgment of the Court.

By his will dated March 8, 1891, the testator, Robert Hack, of Baston, farmer, after a devise of all his freehold and copyhold estates situate in the parish of Baston, in the county of Lincoln, to his sister for life, devised his two copyhold houses, gardens and premises situate in Baston aforesaid, then in the occupation of John Love and Catherine Welsh, and also the piece of copyhold land adjoining containing three roods or thereabouts, then in his own occupation, to his nephew George Beadman for and during the term of his natural life without impeachment of waste, and from and immediately after his death he devised the same premises to the heir at law of the said George Beadman. And he devised his piece of copyhold land containing an acre one rood and thirty-seven perches (more or less) situate in the Outgang Road, Baston, aforesaid, then in his own occupation, and also his piece of copyhold land containing one acre and thirty-nine perches (more or less) situate in the Fen, Baston, aforesaid also in his own occupation to his nephew John Beadman for and during the term of his natural life without impeachment

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of waste, and from and immediately after his decease he devised the same two pieces of land to the heir at law of the said John Beadman. And testator devised his three freehold dwelling-houses, gardens and premises situate in Outgang Road, Baston, aforesaid then occupied by Thomas Love, George Pratt and Thomas Brown to his nephew Joseph Beadman for and during the term of his natural life without impeachment of waste and from and immediately after his decease he devised the same premises to the heir at law of the said Joseph Beadman.

The testator died on September 27, 1900, and his sister on December 26, 1902.

A summons was issued by the plaintiff, George Beadman, to have it determined whether he was entitled to the two copyhold houses, gardens, and the piece of land adjoining as tenant for life, or in customary fee simple for an estate to him and his heirs according to the custom of the manor.

The defendant was the heir at law of the plaintiff.

A. Adams for the plaintiff. If the property were freehold the rule in *Shelley's Case* (1) would clearly apply. The only reported case in which this form of gift appears to have occurred in a will of copyholds is *Busby* v. *Greenslate*. (2) In *In re Davison's Settlement* (3) this form of gift occurred in a deed, and it was held that the rule in *Shelley's Case* (1) did not apply. In *In re Hussey and Green's Contract* (4) the gift by will was in the same form, except that the remainder after the life estate was to the heir at law "absolutely," and this was held sufficient to take the case out of the rule in *Shelley's Case* (1) and the heir at law took by purchase. According to Jarman on Wills, 6th ed., 1860, and Theobald on Wills, 7th ed., 416, the rule in *Shelley's Case* (1) applies to copyhold property. If, in the present case, the devises had been to nephews for life and after their deaths to their respective customary heirs the rule would have applied and have given them customary fee simple estates. Here it is to the heir at law, which usually

(1) 1 Rep. 93*b*.
(2) (1720) 1 Str. 445.
(3) [1913] 2 Ch. 498.
(4) [1921] 1 Ch. 566.

means the heir at common law. In this manor however there is no special custom of descent, and therefore the rule in *Shelley's Case* (1) ought to be held to apply.

G. P. Slade for the defendant, who was heir at law presumptive of the plaintiff and also customary heir. The rule in *Shelley's Case* (1) does not apply here. On the true construction of this will the plaintiff only takes a life estate in the copyholds, and on his death there is a contingent remainder to his heir at law. That expression is used here not as a word of limitation but as a designation of the person, who is to take by purchase: *In re Hussey and Green's Contract.* (2) The test is whether the testator intended the land to descend to the heir at law as such in course of succession. Copyholds do not descend to the heir at law as such, and the expression is inapplicable to copyholds. Further, the life estate is given without impeachment of waste, an expression applicable to an estate for life only: *Evans* v. *Evans.* (3) If these words had occurred in a deed the rule in *Shelley's Case* (1) would not have applied.

A. Adams in reply.

Cur. adv. vult.

May 26. EVE J. [after reading the will of the testator as above stated, continued:] This summons has been issued in order to have it determined whether George Beadman is entitled to the two copyhold houses, gardens, and premises formerly in the occupation of John Love and Catherine Welsh, and the piece of copyhold adjoining, as tenant for life or in customary fee simple for an estate to him and his heirs according to the custom of the manor of Baston. There being no special custom of descent in the manor the copyholds are governed by the ordinary law of descent, and had the limitation in remainder been to "the heir of the said George Beadman," it could not, I think, have been suggested that the case is not one to which the rule in *Shelley's Case* (1) is applicable. Does the use of the expression "heir at law" exclude the application of the rule? I think not—the word

(1) 1 Rep. 93*b*. (2) [1921] 1 Ch. 566, 573.
(3) [1892] 2 Ch. 173.

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heir menas the heir at law, and in the case of freehold limitations in remainder after a life estate no distinction has been suggested between the expression "his heir" and "his heir at law." Assuming, as I think I must, that the testator was aware of the fact that there was no special custom of descent affecting his copyholds, I do not think I ought to raise any distinction here, and accordingly I hold that the rule applies, and that the applicant is entitled in customary fee simple for an estate to him and his heirs according to the custom of the manor.

Solicitors for both parties: *Bell, Brodrick & Gray, for Adam & Son, Oakham.*

G. M.

LAWRENCE J.
1925
May 12.

In re FIELD.

SANDERSON *v.* YOUNG.

[1923. F. 1959.]

Will—Settlement of Leaseholds—Primary Trust to pay the Rents and perform Covenants—Equitable Tenant for Life—Receipt of Rents after Death of last surviving Trustee with Knowledge of primary Trust—Liability of Tenant for Life to perform repairing Covenant—Acceptance of Benefit cum onere.

By deed poll, in 1878, R. in exercise of a power conferred upon her by the will of her father J. F. deceased, appointed that the trustees of his will should, after her death, stand possessed of certain leasehold houses upon trust, after payment of the rents reserved by the leases under which the same were respectively held and costs of insurance and the performance of the covenants (which included covenants to repair) in the said leases, to pay to Y. or otherwise permit her to receive the rents and profits of the leasehold houses during her life, and, after her decease, the same were directed to be held upon trust (in the event which happened) for Y.'s daughters in equal shares.

R. died on August 15, 1882, and after the death, in 1909, of the last surviving trustee of the will, whose personal representatives declined to intermeddle in the trusts thereof or to appoint new trustees, Y. entered into the receipt of the rents of the leasehold houses and continued therein down to her death in 1922.

In an action by the daughters of Y. against her personal representatives for damages out of her estate by reason of Y.'s failure, while tenant for

life in possession of the leasehold houses, to keep the same in repair in accordance with the covenants in the leases:—

Held, that upon entering into the receipt of the rents of the leasehold houses under the appointment in her favour with knowledge of the primary trust for the application of the same, Y. assumed the duties of the trustees and became herself directly liable to perform that trust as a condition precedent to her taking the benefit of the appointment; but that her liability must be limited to the period during which she was in actual receipt thereof—namely, from March 27, 1909, to her death in 1922—and also to the amount of the rents which she received during that period, an inquiry being directed as to the amount of damages the plaintiffs were entitled to recover.

The principle of *In re Williames* (1885) 54 L. T. 105 applied.

ACTION WITH WITNESSES.

John Field, by his will, dated November 21, 1843, bequeathed to trustees fifteen leasehold messuages in Canvey, Zoar and Red Cross streets in Southwark, to hold the same (subject to the payment of the rents and observance and performance of the covenants reserved by and contained in the leases under which the same were held) upon trust in the first place to pay the rents and costs of insurance and of the performance of the covenants and to renew the leases as and when necessary and to pay to Mrs. Mary Ann Dyer Routledge or permit her to receive the rents and profits of the leasehold premises during her life, and, after her decease, upon trusts in favour of her children, and in default thereof upon trust for such persons in such shares and in such manner as Mrs. Routledge should by deed appoint the same.

The testator died on February 26, 1845, and on or about May 13, 1873, the leases under which the specifically bequeathed premises were held were surrendered by the trustees of the will and new leases were granted of the same premises to two of the trustees, which contained, amongst other covenants, covenants by the lessees to keep the leasehold premises in good repair.

By deed poll, dated April 2, 1878, which contained a recital of the will, Mrs. Routledge appointed that the trustees thereof should stand possessed of the leasehold premises upon trust, after payment of the respective rents and the costs of insurance and the performance and observance of the covenants reserved by and contained in the leases, to

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pay to Mrs. Louisa Ann Young or otherwise permit her to receive and take the rents and profits of the leasehold premises during her life and that from and after her decease the leasehold premises should be held upon trust for the daughters of Louisa Ann Young as therein mentioned.

Mrs. Routledge died on August 15, 1882, without issue, and Henry John Young, the last surviving trustee of the will, died on March 27, 1909. His personal representatives, although willing to appoint new trustees of the will, declined to intermeddle in the trusts and never acted as trustees thereof. Upon the death of H. J. Young Mrs. Young entered into the receipt of the rents of the leasehold premises and continued to collect and receive the same down to the date of her death on January 18, 1922: whereupon her three daughters, the two plaintiffs, and Mrs. Mills became entitled in possession to the leasehold premises. In 1923 Mrs. Mills assigned her share and interest therein to the plaintiffs.

In this action against the personal representatives of Mrs. Young the plaintiffs alleged that during the time that their mother, Mrs. Young, was in receipt of the rents she failed to keep the leasehold premises in proper repair in accordance with the covenants contained in the leases, and claimed a declaration that she, as equitable tenant for life, was under an obligation so to do and damages out of her estate for breach of her obligation.

Jenkins K.C. and *Lyttelton Chubb* for the plaintiffs. Mrs. Young, as tenant for life, entered into possession of the leasehold premises on the death of H. J. Young, the last surviving trustee, and, as his legal personal representatives did not act in the trusts and no new trustees were appointed, she thereupon became a constructive trustee, and came under the obligations imposed by the primary trust mentioned in the will and the deed of appointment to pay and apply the rents in the first instance in (amongst other matters) keeping the premises in proper repair. As she failed to fulfil those obligations and allowed the property to fall into a state of disrepair, her estate is liable to make good her default.

Regardless of the question of waste, if a testator gives property to trustees for one for life and directs that the tenant for life shall keep the property in repair during his life, the estate of the tenant for life is liable, on his decease, for his failure to repair while in the enjoyment of the property: if he takes the benefit, he must accept the burden cast upon him by the settlor; and, if he refuses the burden, he comes under a liability which a Court of equity will enforce against him: *In re Williames* (1); *Jay* v. *Jay*. (2)

Bischoff (*Joy K.C.* with him) for the legal personal representatives of Mrs. Young. It is not disputed that where a testator gives an explicit direction to the tenant for life to perform a certain obligation, the tenant for life can only take the benefit cum onere. But here the obligation is imposed upon the trustees, and the tenant for life is not liable for their breach of their obligation. Down to the death of Mr. H. J. Young no claim in consequence of the omission to repair could have been successfully made against Mrs. Young as tenant for life. After his death she was entitled to collect and receive the rents without thereby making herself a trustee. In the case of *In re Williames* (1) the duty was cast by the testator upon the tenant for life, and not, as in the present case, upon the trustees: on that ground that case is distinguishable from the present. That there exist no trustees to perform the obligation of keeping the property in repair is the fault of the plaintiffs for whose protection trustees are required; it is for them to obtain the appointment of new trustees, as an equitable tenant for life is not liable for repairs. Even if she were liable under the equitable principle recognized in *In re Williames* (1) she can only be liable in respect of the period while she was in actual possession and to the extent of the rents received by her.

Owen Thompson K.C. and *Charles E. Harman* for the legal personal representatives of H. J. Young, the last surviving trustee of the will and of the last surviving lessee.

(1) 54 L. T. 105.

(2) [1924] 1 K. B. 826.

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LAWRENCE J. In this case the plaintiffs claim damages against their mother's estate for the failure by her to carry out the obligation, which they allege she was under, to keep certain leasehold houses in substantial repair. [His Lordship then stated the facts and continued :] There is ample evidence to support the plaintiffs' allegation that during the time their mother was in receipt of the rents, she failed to perform the repairing covenants contained in the leases of the houses in question ; but her legal personal representatives deny that she was under any obligation to perform those covenants ; and the only question which now falls to be determined is whether the plaintiffs are right in their contention that she was under any such obligation. The plaintiffs rely upon the principle recognized by the Court in the cases of *In re Williames* (1) and *Jay* v. *Jay* (2) that a Court of equity will compel a person who takes the benefit to accept the burden cast upon him by the donor. It has not been contended in the present case that the estate of the deceased tenant for life is liable on the ground of waste, as it is well settled, and not disputed, that an equitable tenant for life is not impeachable for waste. The sole ground upon which the plaintiffs base their contention is, that the instruments under which the deceased tenant for life became entitled to the rents contain a primary trust to apply the rents in performing the repairing covenants contained in the leases under which the property is held. Mr. Bischoff in his able argument contended that, as by the will of the testator and by the appointment the duty of so applying the rents is imposed upon the trustees of the will and not upon the tenant for life, the tenant for life was under no obligation to apply the rents in performing the covenants and could retain the whole of the rents without any such application. He pointed out that the plaintiffs had the remedy in their own hands by procuring the appointment of new trustees and insisting upon their performing their duty, and argued that the principle invoked by Mr. Jenkins is inapplicable in the circumstances of the present case.

(1) 54 L. T. 105. (2) [1924] 1 K. B. 826.

The question so raised is one of first impression, as counsel have been unable to find any authority which is directly in point. In my judgment, however, the principle that a person can only take a benefit cum onere is sufficiently wide to cover the facts of the present case. To accede to the contention advanced on behalf of the legal personal representatives of the late tenant for life would, in my judgment, be running counter to the principle.

The tenant for life, when, in the absence of any trustee, she entered into the receipt of the rents, had full knowledge of the primary trusts affecting them, and, in my opinion, she could not retain them for her own benefit without performing those primary trusts. It seems to me that the tenant for life who, strictly speaking, had no right to collect the rents at all, by entering into the receipt of them herself assumed the duties of the trustees and became liable to perform the trusts affecting them as a condition precedent to her being entitled to retain the benefits conferred upon her. To hold the contrary would, in my judgment, be to allow her to take the benefit, whilst repudiating the burden of the gift.

For these reasons I have come to the conclusion that the plaintiffs are right in their contention and are in substance entitled to the declaration which they have claimed; but the obligation which, in my judgment, was thus imposed upon the tenant for life, was only so imposed during the time that she was in actual receipt of the rents—namely, from March 27, 1909, down to her death on January 18, 1922; and the liability of her estate is limited to the failure by her to repair during the time that she was in possession and no further; and the liability of her estate is further limited to the amount of the rents which she received during that period. The proper order to make will be a declaration to the effect which I have stated and then to direct an inquiry as to what damages, on the footing of the declaration, the plaintiffs are entitled in respect of the failure of the late tenant for life to perform the repairing covenants in the leases.

As to the costs of the action: the legal personal

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representatives of the late tenant for life have quite properly put in issue the question of the liability of their testatrix, and, having failed on that issue, I think it is right that they should pay the plaintiffs' costs of action down to and including this judgment. The costs of the inquiry will be reserved.

In my opinion the legal personal representatives of the last surviving trustee of the will of the testator, who by amendment were added as defendants, were wholly unnecessary parties and the action as against them ought to be dismissed with costs.

Solicitors: *A. F. V. Wild; Syrett & Sons.*

H. C. H.

LAWRENCE J. 1925 *May* 14.

In re DAVIES.

SCOURFIELD *v.* DAVIES.

[1924. D. 752.]

Will—Construction—Specific Gift—"Proceeds of sale of such parts as have been sold"—Wills Act, 1837 (1 *Vict. c.* 26), *s.* 24—*Contrary Intention.*

By his will, dated September 5, 1921, a testator made the following disposition: "I devise all my estate known generally as the Williamston estate . . . . to which I have succeeded as tenant in tail under the will and codicils of Sir John Henry Scourfield (which entail I am about to bar) and also the investments and moneys representing the proceeds of sale of such parts of the said estate as have been sold . . . . to my wife in fee simple and absolutely." The testator also gave his residuary estate upon trust to pay the income to his wife, until his son attained twenty-five, and then to the use of his son in fee simple and absolutely. Under the limitations of the will and codicils of his uncle Sir John Henry Scourfield, who died in 1876, the testator had, before the date of his will, become entitled as tenant in tail in possession to the Williamston estate and to the proceeds of sale of parts thereof which had been sold and to the investments thereof which were standing in the names of trustees of that will for the purposes of the Settled Land Acts. The testator died on November 18, 1922, having disentailed the properties to which he was so entitled as aforesaid. Between the dates of his will and death, the testator entered into contracts for the sale of further parts of the Williamston estate, some of which were completed by the testator in his lifetime and others were completed after his death

by his executors. Upon a summons to determine the effect of the devise:—

Held, that the will must be construed as speaking from the death of the testator; and, as the description of the property comprised in the devise to the testator's widow was generic and capable of diminution or increase and no contrary intention appeared by the will within the meaning of s. 24 of the Wills Act, 1837, the devise was effectual to pass the proceeds received in respect of the sales made after the date of the will as well as the proceeds received in respect of the sales made before that date.

In re Horton [1920] 2 Ch. 1 and *In re Evans* [1909] 1 Ch. 784 applied.

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DAVIES, *In re.* SCOURFIELD *v.* DAVIES.

ADJOURNED SUMMONS.

Arthur Picton Saunders-Davies (hereinafter called the testator) made his will dated September 5, 1921, and after appointing executors and trustees thereof, desired that his wife Mabel so long as she remained his widow should occupy Pentre or other the principal mansion house on his estate until his son should attain the age of twenty-five years and bequeathed to her certain of his household effects. Then, after bequests of certain legacies, the will contained the following disposition: "I devise all my estate known generally as the Williamston Estate situate in the Hundred of Roose in the County of Pembroke and in the Town and County of Haverfordwest to which I have succeeded as tenant in tail under the will and codicils of Sir John Henry Scourfield (which entail I am about to bar) and also the investments and moneys representing the proceeds of sale of such parts of the said estate as have been sold and the proceeds of sale of the farm of Broitgairn near Fishguard and the farm of Sychpant . . . . and the proceeds of the residuary estate of the testator which were devised and bequeathed by him to the same uses and upon the same trusts as the Williamston Estate to my wife in fee simple and absolutely." The testator then devised and bequeathed the residue of his real and personal estate, subject to his funeral and testamentary expenses and debts, to his trustees upon trust to pay to his wife as long as she should remain his widow the rents profits dividends and annual produce of his residuary estate until his son should have attained the age of twenty-five years and after he should have attained that age as to his said

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residuary estate both real and personal to the use of his said son in fee simple and absolutely, but if he should die without issue then as to his residuary real estate to the use of the testator's daughter Barbara Cecil Saunders-Davies in fee simple and as to his residuary personal estate to her absolutely with an ultimate gift over in case she should die without issue.

Under the limitations of the will and codicils of his uncle, Sir John Henry Scourfield, who died in 1876, the testator had before the date of his will become entitled as tenant in tail in possession to the Williamston estate and to the proceeds of sale of such parts of that estate as had been sold and of Broitgairn farm amounting together to more than 2700*l.*: he was under the same limitations also entitled as tenant in tail in possession to the proceeds of sale of the residuary personal estate of the same testator amounting to more than 4000*l.*; both of those sums were liable to be invested in the purchase of land to follow the limitations of the Williamston estate and stood invested in the names of the trustees of that testator's will for the purposes of the Settled Land Acts. The farm of Sychpant did not belong to the testator at all and no proceeds of that farm could be traced.

The testator died on November 18, 1922, having disentailed the properties to which he was entitled, as before stated, under the will and codicils of Sir John Henry Scourfield.

Between the date of his will and his death the testator entered into divers contracts for the sale of other parts of the Williamston estate. In some cases the sales were completed during his lifetime, the proceeds of which amounted to about 35,000*l.*, the greater part of which sum was alleged to have been given by the testator in his lifetime to his wife. In other cases, the sales, not having been completed by the testator in his lifetime, were completed and conveyances executed by his executors, the proceeds of which sales coming to their hands amounted to about 39,000*l.* In respect of sales effected after the date of the testator's will, some of the purchase moneys remained on mortgage of the properties sold.

This summons was taken out by the trustees of the will for the determination of the question whether upon the true construction of the will the gift to the testator's wife comprised only the proceeds of the sales of the parts of the Williamston estate which had been sold before the date of the will, or included also the proceeds of the sales of those parts of that estate which were sold by the testator after the date of his will.

H. F. F. Greenland for the plaintiff.

Owen Thompson K.C. and *J. G. Wood* for the testator's widow. The testator's intention was to benefit his wife. In order to find a contrary intention within s. 24 of the Wills Act (1)—namely, that the will should speak as to the sales not from the date of death, but from the date of the will, very clear words must be found: it has been held that the prefix "now" before the word "possess" does not increase the force of the words "which I possess."

The gift here is no more than a gift of the Williamston estate and the investments and moneys representing the proceeds of sale of the sold parts. That would pass the proceeds of sale of any part sold after the date of the will as well as before that date. The additional words "as have been sold" are merely descriptive and do not limit the generality of the words "proceeds of sale." In *Wagstaff* v. *Wagstaff* (2) the gift was of ready money, bank and other shares, freehold property and any other property "that I may now possess"; and it was held that the insertion of the word "now" before the word "possess" was not a sufficiently distinct indication in the will that property acquired after the date of the will was not to pass. In *Everett* v. *Everett* (3) Cotton L.J. said the effect of the statute ought not to be frittered away by catching at doubtful expressions for the purpose of taking

(1) Sect. 24: "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

(2) (1869) L. R. 8 Eq. 229.

(3) (1877) 7 Ch. D. 428.

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the case out of the statute. *In re Champion* (1) was a case of a gift of a certain cottage with all the land thereto belonging and "now in my own occupation," and those words were held to be an incidental description and not an essential part of the description qualifying the generality of the previous description. Those cases show that the words indicating a contrary intention must be clear. *In re Ashburnham* (2) was a case of a gift of "all my furniture and household effects at present at Aubrey Lodge," and it was held to pass a motor car purchased by the testator after the date of his will at Aubrey Lodge at the date of his death. The words "at present at Aubrey Lodge" were treated as merely descriptive and not a strong enough indication of a contrary intention within the meaning of s. 24. The words "at present" were treated as ambulatory words and bearing an artificial meaning owing to the effect of s. 24. *In re Horton* (3) was a case where the words "now held by me as a customary tenant of the said manor" added to a gift of all the testator's copyholds parcel of the manor of L. were held not to be an essential part of the description and therefore did not indicate a contrary intention.

Jenkins K.C. and *Henry Johnston* for Barbara C. Saunders-Davies, one of the residuary legatees. Sect. 24 does not compel one to construe whatever a testator says in his will as if it were written at the date of his death: the section does not say that for the purpose of deciding rights between beneficiaries or for all purposes a will is to be read as if made at the date of death. It is necessary to see what is comprised in the will: the section does not declare that either a specific or a residuary gift is to have more weight than the other, but only that the property is to be comprised in the will. When upon the construction of the specific gift, the intention of the testator is made clear, the section is not to be strained so as to defeat that intention, but should be construed to give effect to it. The condition of things in reference to which the will is made must be taken into consideration: *In re*

(1) [1893] 1 Ch. 101. (2) (1912) 107 L. T. 601.
(3) [1920] 2 Ch. 1.

Portal and Lamb (1); *In re Evans.* (2) The devise here is specific: the circumstances show that the testator was pointing to sales of particular parts of the estate which had taken place before the date of his will. His will deals with three separate sets of assets all of which were in existence at that date, the land, proceeds of land then sold and the residuary personal estate which was settled to go with the land. We adopt as part of our argument a passage in Jarman on Wills, 6th ed., p. 414, dealing with the decisions in the two cases of *In re Portal and Lamb* (1) and *In re Evans.* (2) Looking at all the circumstances the question is which of the gifts in the will carries the proceeds of the sales made after the date of the will? It cannot be disputed that, apart from the statute, the sales and contracts for sale would have effected an ademption so far as the gift was a gift of land. The specific devisee cannot claim the proceeds of the sales made after the date of the will by virtue of the gift of the proceeds of such parts as "have been sold" and of s. 24 of the Act. The case of *In re Ashburnham* (3) is, we submit, of doubtful authority: the testator there was referring to specific chattels: neither *In re Portal and Lamb* (1) nor *In re Evans* (2) was cited in that case.

Vaisey for the son, the other residuary legatee. This is a pure question of construction. Where you have, as in this case, definite property which can be identified at the date of the will, an intention is distinctly shown that that property then in existence was the property intended to be comprised in the gift. The testator uses the past tense with regard to the proceeds of sale, and s. 24 was never intended to make a will speak nunc pro tunc so as to enlarge its ambit.

[He also referred to Jarman on Wills, 6th ed., p. 411, and *Sidney* v. *Sidney.* (4)]

LAWRENCE J. In my opinion the question raised on this summons is not free from doubt. The question, stated broadly, is whether the proceeds of sale of certain real estate

(1) (1885) 30 Ch. D. 50.
(2) [1909] 1 Ch. 784.
(3) 107 L. T. 601.
(4) (1873) L. R. 17 Eq. 65.

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sold since the date of the testator's will pass by the gift of "the proceeds of such parts of the said estate as have been sold." The scheme of the will is to my mind fairly plain. The testator devises an estate of considerable size, called the Williamston estate, stating in the devise that he had succeeded to it as tenant in tail under the will and codicils of Sir John Henry Scourfield, which entail he was about to bar. He also bequeaths the investments and moneys representing the proceeds of sale of such parts of the estate "as have been sold" and also the proceeds of sale of certain farms which he mentions and the proceeds of the residuary personal estate of Sir John Henry Scourfield, to his wife in fee simple and absolutely. He also bequeaths to her furniture and household effects and articles of personal and household use, garden tools, etc., at his mansion house called Williamston. After reciting that he has made provision for his daughter Barbara Cecil, he gives the residue of his real and personal estate, which he calls "my residuary estate," subject to the payment of funeral and testamentary expenses and debts, to trustees upon trust to pay the income to his wife during widowhood, until his son should attain twenty-five years, and after he attains that age the son takes the whole of the residuary estate in fee simple and absolutely.

That being the scheme of the will it seems to me fairly obvious, without any desire to beg the question which I have to decide, that the testator intended his wife to take everything that came to him under or by virtue of the will of Sir John Henry Scourfield.

The facts which have given rise to the question of construction, stated quite shortly, are as follows. [His Lordship then stated the facts and continued:] In those circumstances, the question is, what is the effect of s. 24 of the Wills Act on the specific gift which the Court has to construe? The section says: "Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will." According to

the express wording of that section the will is to speak and take effect not generally, but " with reference to the real and personal estate comprised in it," as if it had been executed immediately before the death of the testator, as was clearly pointed out by Lindley L.J. in the case of *In re Portal and Lamb.* (1) Bearing this in mind, the question which has to be considered is whether with reference to the real and personal estate comprised in this gift—namely, the Williamston estate and the proceeds of sale of such parts of that estate as had been sold—the will is to speak and take effect as if it had been executed immediately before the testator's death, so as to include the proceeds of sales which came into existence between the date of the will and the date of the death, or whether a contrary intention appears by this will, so as to limit the gift of the proceeds of sale to such proceeds as were in existence at the date of the will.

Eve J., having in the recent case of *In re Horton* (2) examined in some detail the relevant authorities under this section, including most of those cited on the present occasion, I do not propose again to review those authorities, but will content myself by quoting the following passage from the judgment of that learned judge. (3) " The testator must be taken to know that his dispositions will be construed with reference to the property comprised in them as if his will had been executed immediately before his death, and the possessive pronoun, the present tense, and the adverb ' now ' being equally capable of being read as referring to the subject matter then existing, they will in fact be so read, unless he makes clear his intention that his will should, in these respects, be construed as on the date he made it." Now, if that be, as I think it is, the true principle, it applies in my opinion equally to the case where the past tense has been used in describing the subject matter of the gift. A testator by his will bequeathing property which is capable of increase or decrease and describing such property by a generic term, such as " proceeds of sale," must, in my judgment, be taken to have

(1) 30 Ch. D. 50, 55.

(2) [1920] 2 Ch. 1.

(3) Ibid. 11.

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known that with reference to that property his will would be read as if it had been executed immediately before his death; and the past tense being equally capable of being read as referring to the subject matter as existing at the date of his death, the Court will, in fact, so read the will, and will not hold that the mere use of the past tense amounts to a contrary intention within the meaning of s. 24. The following passage in the judgment of Joyce J. in *In re Evans* (1) is also worth quoting: "It is well settled that there may be such a specific description of the subject of a gift as to shew that what was intended to pass, whether real or personal estate, was some particular thing in existence at the date of the will. When, however, the description is generic, as 'all my lands in the county of X.,' the subject of the devise being capable of increase or diminution, all the testator's lands in the county of X. at the date of his death will pass; and where there is such a particularity in the description of the subject of a gift as to shew that it was some object in existence at the date of the will that was intended to pass, it is considered that there is a sufficient evidence of a contrary intention to exclude the application of the provisions of s. 24." In the present case, the description of the subject matter of the gift is clearly generic, and not comparable to a gift of "my brown horse" (the illustration given by Mr. Vaisey), which latter is incapable of diminution or increase. That being so, and the past tense being equally applicable to the subject matter of the gift as existing at the date of the death of the testator, I am of opinion that s. 24 of the Wills Act applies and the gift carries to the widow the proceeds of sale of all property sold since the date of the will, including the amounts left on mortgage and the amounts which came to hand after the date of the testator's death.

Solicitors: *Kerly, Sons & Karuth, for W. Evans-George & Sons, Newcastle Emlyn; Andrew, Wood, Purves & Sutton; Peacock & Goddard, for Eaton Evans & Williams, Haverfordwest.*

(1) [1909] 1 Ch. 784, 786.

H. C. H.

RUSSELL J.
1925
May 14.

In re NORTHCLIFFE.

ARNHOLZ *v.* HUDSON.

[1923. N. 809.]

Will—Voluntary Covenant to settle after acquired Freeholds—Settlement confirmed in Will and Benefits under it and Will declared Cumulative—Confirmation of Will in Codicils—Republication of Will—Declaration of Trust.

The settlor entered into a voluntary covenant in an indenture under seal to settle upon certain trusts any freehold properties (with one exception) that he should afterwards acquire in Kent, and that until such assurance should have been actually made he, his heirs, executors, and administrators "shall and will stand seised of all and any such after-acquired hereditaments upon such trusts and with and subject to such powers and provisions as last aforesaid." The settlor afterwards acquired four freeholds in Kent that came within the covenant. The settlor by his will, which was executed after the two first freeholds had been acquired by him, confirmed the settlement, and declared that the benefits under the will were to be in addition to those under the settlement. After acquiring the last two freeholds the testator executed two codicils, in each of which he confirmed his will:—

Held, that by confirming the settlement in his will and directing that the benefits under the settlement and will should be cumulative the testator had declared in his lifetime that the trustees of the settlement were entitled to the first two freeholds and that he (the testator) held them on the trusts of the settlement, and that by confirming his will in the two codicils he republished his will at the dates of the codicils, and so made the same declaration with regard to the two freeholds last acquired, and that therefore the executors of the will were entitled to assure to the present trustees of the settlement the freeholds aforesaid.

ADJOURNED SUMMONS.

On November 18, 1911, Lord Northcliffe executed a voluntary settlement of certain freeholds in Kent, which were conveyed to the plaintiff, Henry Preus Arnholz, and to Sir George Sutton, as trustees for sale. By a deed of even date trusts were declared of the proceeds of sale. The settlement contained the following covenant: "And the settlor doth hereby covenant with the trustees that if he the settlor shall at any time or from time to time during his life acquire by purchase or otherwise for an estate of inheritance in fee simple in possession any other freehold hereditaments in the said county of Kent not being or forming part of certain

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hereditaments comprised in an indenture of settlement dated the 23rd day of December 1893 and made between the settlor then Alfred Charles William Harmsworth of the one part and Frederic Nevill Jackson Harold Sydney Harmsworth and Cecil Bisshop Harmsworth of the other part he the settlor his heirs executors or administrators will forthwith at the cost of the trust estate assure the same to the like uses and upon the like trusts and with and subject to the like powers and provisions as are hereinbefore expressed and contained concerning the said hereditaments hereby assured or as near thereto as the deaths of parties or other intervening circumstances shall admit and that until such assurances shall have been actually made he the settlor his heirs executors or administrators shall and will stand seised of all and any such after acquired hereditaments upon such trusts and with and subject to such powers and provisions as last aforesaid."

Lord Northcliffe afterwards acquired four other freeholds that came within the terms of the covenant, the two first in August, 1913, the third in May, 1920, and the fourth in February, 1922. These properties were vested in him at the time of his death. Lord Northcliffe died in August, 1922, leaving a will dated March 22, 1919, and three codicils. By his will the testator appointed the two trustees of the settlement executors, and in cl. 2 declared: "I also confirm the undermentioned deeds and settlements that is to say . . . . the conveyance on trust for sale dated November 18, 1911 . . . . and I declare that the provisions hereby made (unless the contrary is expressly stated herein in respect of any particular benefit) are intended to be in addition to and not in satisfaction of those made or covenanted to be made in and by the said settlements conveyances on trust indentures and declarations of trust respectively." By the second codicil to his will, dated June 23, 1920, the testator directed his trustees to pay a certain sum to the trustees of the settlement of November 18, 1911, to be held and applied by them on the trusts of the said settlement of proceeds of sale, and continued: "All the benefits given by this codicil are in addition to any bequests or benefits given by my will or

otherwise And in all other respects I confirm my said will as altered by the said former codicil." By the third codicil to his will, dated April 27, 1922, the testator after giving certain directions to his executors declared: "Save as aforesaid I confirm my will."

The summons asked: Whether the plaintiff and the defendant, Sir George Sutton, as executors of the testator, should or may (in fulfilment of a voluntary covenant by Lord Northcliffe for the assurance and settlement of after acquired freehold property in Kent contained in an indenture under seal dated November 18, 1911, and made between Lord Northcliffe of the one part and the plaintiff and Sir George Sutton of the other part) assure to the plaintiff, Sir George Sutton, and Montague Ellis, the present trustees of the said settlement, all such freehold hereditaments in Kent as were acquired by Lord Northcliffe after the date of the said indenture of November 18, 1911, and still remained vested in him at his death.

G. B. Hurst K.C. and *Spens K.C.* for the plaintiff.

Luxmoore K.C. and *Bryan Farrer* for Montague Ellis, one of the trustees of the settlement. Although the Court will not grant specific performance of a voluntary conveyance there is here a sufficient declaration of trust to enable it to say that these freeholds belong to the trustees.

Knowing that he had acquired properties in Kent that came within the terms of the covenant in the settlement the testator in cl. 2 of his will confirms the settlement and declares that the benefits under his will are to be in addition to those under the settlement—that is, the trustees are to be entitled to the benefit of the covenant that the testator would settle after acquired properties, and that until he did so "he would stand seised of all and any such after acquired hereditaments upon such trusts . . . . as last aforesaid." That is a declaration by the testator that he holds the first two properties acquired in 1913 upon the trusts of the settlement.

By the second and third codicils to his will the testator republishes his will and brings the confirmation of the

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settlement down to those dates and so declares himself a trustee of the properties acquired in 1920 and 1922: *In re Fraser* (1); *In re Hardyman.* (2)

Bennett K.C. and *Whinney* for a beneficiary under the will. It is said that because the will confirms the settlement the testator constituted himself during his life a trustee for the purposes of the settlement of the property he had acquired.

A will is an ambulatory instrument, which the testator could revoke at any time. If the confirmation of the settlement were a declaration of trust from which the testator could not withdraw an intention not to revoke the will must be imputed to him. All that the testator does is to declare that at his death the settlement is to be regarded as valid and binding on him, but he does not add to the operation of the instrument itself, and he had no intention of declaring himself a trustee of the freeholds.

A. L. Ellis for Sir George Sutton.

L. F. Potts for charities entitled to a share of residue.

Dighton Pollock for the Attorney-General.

RUSSELL J. The first two properties were acquired by the testator in August, 1913, and on March 22, 1919, he made his will, and referred to the settlement of November 18, 1911, knowing that he had after acquired freeholds in the county of Kent. With that knowledge the testator confirms the settlement, and directs that the gifts and benefits conferred by the will and settlement are to be cumulative—that is, the beneficiaries under the settlement are to enjoy all the benefits contemplated by the settlement, including the benefit of the covenant and declaration contained therein. I read that as a declaration by the testator that he holds the Kent freeholds upon the trusts of the settlement. It was said that a will was an ambulatory document, but in my opinion any clause may be referred to in order to prove a fact, and I am satisfied that when the testator executed his will he recognized, and stated as a fact, that he held the Kent freeholds upon the trusts of the settlement. The position is the same with regard

(1) [1904] 1 Ch. 726, 734. (2) Ante, p. 287.

to the other properties, for in each case the testator, by a codicil executed after he had acquired the properties, confirmed and republished his will. Accordingly I declare that the executors should and may assure to the present trustees of the settlement the four freehold properties in Kent mentioned in the evidence.

Solicitors: *Russell & Arnholz; Ellis, Peirs & Co.; Nicholson, Graham & Jones; Hurford & Taylor; Treasury Solicitor.*

J. B. B. M.

C. A. 1925 *April* 28, 29, 30.

DEWHURST *v.* SALFORD GUARDIANS.

[1923. D. 2257.]

Statute—Contracting Out—No express Prohibition—Limited Class of Community—Poor Law Officers and Servants—Compulsory Pensions Scheme—Compulsory Contributions—Poor Law Officers' Superannuation Act, 1896 (59 *&* 60 *Vict. c.* 50)—*Poor Law Officers' Superannuation Act Amendment Act,* 1897 (60 *&* 61 *Vict. c.* 28).

A compulsory scheme for providing superannuation pensions for poor law officers and servants was established by the Poor Law Officers' Superannuation Act, 1896. Obligatory pensions were payable by the guardians, and obligatory contributions by the officers and servants. The pensions were expressly made inalienable, but there was no express provision against contracting out:—

Held, upon the construction of the Act, that it was not open either to the guardians or to their officers or servants to contract themselves out of the statutory obligations and rights respectively imposed or conferred upon them by the Act.

Decision of Astbury J., ante, p. 139, reversed.

APPEAL from a decision of Astbury J. (1)

The plaintiff had been an officer or servant in the defendants' employment from February 10, 1908, to May 19, 1922, when he retired on account of ill health.

From March 25, 1917, to March 25, 1922, the last quarter day of the five years preceding his retirement, he had received 1288*l.*, made up of 780*l.* salary and 508*l.* war bonus.

In computing the plaintiff's superannuation allowance

(1) Ante, p. 139.

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under the Poor Law Officers' Superannuation Act, 1896, the defendants had disregarded the bonus and based their computation on the salary alone. They had in fact never deducted the statutory 2 per cent. contribution on the bonus, and on July 20, 1923, they refused a tender covering that amount.

On October 11, 1923, the plaintiff commenced this action for a declaration that the bonus must be included in the computation and for an account and payment accordingly.

The defendants, while admitting that the bonus was prima facie a statutory emolument for the purpose of the computation, proved that in their circulars offering or increasing the bonus from time to time they had invariably stated that it was made on the distinct understanding that the Superannuation Act had no relation thereto, either as regards deductions or benefits, and that they should assume that the plaintiff agreed thereto unless they heard from him to the contrary within a limited time therein stated. They submitted that as the plaintiff took no exception to any of these circulars, but accepted the bonus payments without any statutory deduction, he had to that extent by conduct contracted himself out of the Act.

The plaintiff contended that such a contract, even if made, would be ultra vires. He also submitted that his conduct did not amount to an acceptance of the defendants' conditional offers. On this latter contention both Astbury J. and the Court of Appeal held that the plaintiff had by his conduct accepted the defendants' offers and had so purported to contract himself out of the Act. Upon the question whether the plaintiff could contract himself out of the Act Astbury J., though not without considerable hesitation, came to the conclusion that contracting out was not impliedly prohibited by the Act, and dismissed the plaintiff's action.

The plaintiff appealed. The appeal was heard on April 28, 29, and 30, 1925.

Archer K.C. and *Tindal Atkinson* for the appellant repeated the arguments put forward in the Court below, and in addition

referred to *Baddeley* v. *Earl Granville* (1); *Thornely* v. *Lord Leconfield* (2); and Halsbury's Laws of England, vol. iv., p. 400.

Luxmoore K.C. and *C. W. Turner* for the respondents, repeated the arguments put forward in the Court below, and in addition referred to *Attorney-General* v. *Clarkson* (3) and the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), and the National Insurance Act, 1911 (1 & 2 Geo. 5, c. 55).

POLLOCK M.R. We need not trouble you, Mr. Archer. This is an appeal from a decision of Astbury J. (4), which raises an important point. Astbury J. came to the conclusion which he did with some doubt, and he expresses himself thus: "On the whole, though not without considerable hesitation, I have come to the conclusion that contracting out is not impliedly prohibited by this Act." We have had I think the advantage of a more complete argument than Astbury J., and I have come to the conclusion that the appeal must be allowed on the ground that the Act does not allow contracting out.

This particular claim, I understand, does not involve many cases as between the Salford Guardians and their employees, but it may involve a number of similar cases where employees have been rendering services to other boards of guardians. Therefore I will state my reasons for my judgment with some particularity. There are three questions which were raised before the learned judge. One of them is not raised before us—namely, the question whether the Public Authorities Protection Act had any application to the present case. The two points which were put before the learned judge and with which we have to deal are: (1.) was there in fact an agreement by the plaintiff to contract himself out of the

(1) (1887) 19 Q. B. D. 423, 426.
(2) [1925] 1 K. B. 236; 40 Times L. R. 143.
(3) [1900] 1 Q. B. 156.
(4) Ante, p. 139.

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compulsory clauses of the Act? and (2.) if there was such a contract made by the plaintiff, was it a contract which was good in law and binding upon himself? The learned judge came to the conclusion from the facts that the plaintiff had contracted out of the Act and he dismissed the plaintiff's action. The facts may be succinctly stated as follows. It appears that the plaintiff had been an officer or servant in the defendants' employ from February 10, 1908, until May 19, 1922, when he retired from their service on account of bad health. During the time he was in their employ he had made progress and received the continued and increased confidence of the board of guardians, who had advanced him from post to post, and he had come to be not only one of their assistant relieving officers, but I think at the time he retired he was actually one of their relieving officers, and, therefore, carrying out important duties. Now, an officer who is employed by the board of guardians enjoys the rights which are given to him under the Poor Law Officers' Superannuation Act of 1896. As to the effect of that Act I will say a word in a moment, but the scheme of the Act is this, that a person who is employed as an officer under the guardians of the poor law is entitled to receive on his ceasing to hold his office—as for instance by ill health—the superannuation allowance according to the scale laid down in the Act. The scheme is one to which the officers themselves are contributors. The contribution has to be made by an officer or servant in the service or employment of the guardians, and the amount that they are to pay is a sum which is a percentage of the amount of the salary or wages or emoluments —and emoluments include all fees, poundage and other payments made to any officer or servant as such for his own use. At the time, therefore, when in 1908 Mr. Dewhurst became the servant of the guardians, deductions were made from his salary or wages or emoluments for the purpose of reserving to him the superannuation or retiring allowance to which, when the facts justified it, he would become eventually entitled. The Act provides that there shall be a deduction made from the actual payments

when the payments are in the form of wages. On the other hand, where no actual payment is made by the guardians themselves, but their registrars receive moneys out of which they take their remuneration, then, by s. 17, the return has to be made by the registrars of the Crown, and they have to pay into this fund for the purpose of providing these pensions, a percentage of their fees to the guardians. In the course of Mr. Dewhurst's appointment he had these deductions made, and he was, therefore, contributing what he ultimately thought, if his health failed, would be a superannuation allowance on his retirement. In 1918, the guardians, in accordance with the prevailing practice consequent upon the rise in prices, determined to add a bonus to the wages or emoluments of their employees, and on March 12 notice was given to their employees that this gratuity would be allowed. But, after very careful consideration and communication with what is now the Ministry of Health, they determined that these sums so paid should be free from superannuation deductions, and, consequently, beyond the scope of computation for any purposes of the Poor Law Officers' Superannuation Act of 1906. It is clear that the guardians thought that this would be in the interests of those persons who were going to receive these gratuities or bonuses. At that time it was supposed that high prices might not prevail for a long time, and that if deductions were to be made on the basis that those gratuities fell into the sum on which a percentage of the contributions was to be calculated as being emoluments enjoyed by the servant, it might well be that over a period of a few years the servants might be making contributions increased by the fact that they were receiving a temporary bonus or gratuity. On the other hand, if the scheme of the Act was ultimately worked out as it stood, the servant would be entitled to a sum equal to ten-sixtieths of the average amount of his salary or wages and emoluments during the five years ending on the quarter day which immediately precedes the day on which he ceases to hold his office or employment. That is under s. 3. Thus it may be found that he made

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contributions during the years in which he was receiving these gratuities, but they have passed out of computation of the average of his salary or wages during the five years over which the amount of his superannuation allowance has to be ascertained. So it was that the guardians communicated with their officers and said that unless they heard to the contrary, they would presume their officers agreed with this view and were prepared to agree that gratuities or bonuses should be left out of account both from the point of view of contribution and computation to ascertain the amount of superannuation allowance. The learned judge rightly finds that this silence on which the guardians rely, where they said "Unless I hear to the contrary on or before the 18th instant, I shall assume that you do so agree," that is to say within a week, would not give an assent to a contract. But it is to be noted that Mr. Dewhurst accepted the sums paid to him without any reduction at all in respect of a percentage contribution to the superannuation fund, and the learned judge rightly finds that Mr. Dewhurst's conduct over a period, not merely of weeks, not merely of months, but over a period of years, does indicate that he assented to the course adopted and explained clearly by the guardians. There was in fact a contract made on his part as to the bonuses that he should not contribute any percentage of the bonus or gratuity which he received and that the sum of the gratuity and bonus should be left out of the amount of the percentage which he was to receive if and when he retired.

Mr. Dewhurst retired, as I have said, on May 19, 1922, and when he retired the guardians considered what should be the superannuation allowance. Public bodies are often criticised for what they do, and I think it is right to state quite plainly that the guardians had considered Dewhurst's case both sympathetically and generously. They took, as they were bound to do, the scale which is provided by the Act under s. 3, and they asked themselves what was the sum to which he was entitled. That, in fact, came to a sum of, I think, 36*l.* 8*s.*, but the Act also gave them power to add

a gratuity if they were minded so to do, and if the Ministry of Health assented to that course. On their own suggestion they proposed that in the case of Mr. Dewhurst, who had rendered valuable and faithful service to the guardians, they should give him, not merely the allowance to which by his contributions and by the system of the Act he had become entitled, but a gratuity which approximated to a year's superannuation allowance. They proposed to give him an addition of 35*l.*, and to that gratuity they secured the assent of the Ministry of Health. Mr. Dewhurst was not satisfied, and in spite of his contract and in spite of the fact that he had reaped the advantage of not having had deductions made from the gratuity which he had received by way of war bonus, he claims against the guardians that he is entitled to set aside his own contract, and to ask for further increase to his superannuation allowance, to which he has not contributed, on the ground that the contract which he made by his conduct over a long period of time is not binding upon him, because it is bad in law. He has had the advantage of not having had deductions made over the period of years during which he has enjoyed the bonus, that is from 1918 until 1922, and during the time that he has enjoyed the bonus, without deduction, the sum he has received is no less a sum than 508*l.* If that bonus had been subjected to what, I think, was the proper deduction, he would have had to pay over the period of months and years during which the salary was paid his 2 per cent. on the sums received, and it appears that arithmetically those sums amount to about 12*l.* It must be pointed out that from the point of view of the guardians their position is very different or may be very different. For if they adopt a system whereby the contributions of each of the employees are put into the hands of an insurance company, or if they have a scheme for working out their superannuation allowances actuarially, placing the contributions from time to time to the fund under the scheme, they would secure an accretion to the sums actually received over a period of years. It may well be that the sums Mr. Dewhurst ought to have paid would have reached

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in value more than the 12*l*. However, Mr. Dewhurst now takes the point that the contract he made is a bad one, and he says the sums he has received must be considered from the point of view of ascertaining his superannuation allowance. I think it ought to be stated that in that way he would reap the advantage, for he would not have to meet his deductions during the period of four years, and he asks the guardians to set aside his own contract now that it appears to his advantage to treat it as if there had been a contribution.

Under these circumstances we have to consider the question whether or not these gratuities or bonuses ought to be subject to a percentage contribution. I think that question lies within a small compass. By the Act of 1864 the guardians were authorized, if so minded, to provide for superannuation allowance to the officers employed by them. It was a permissive Act, and it gave power to the guardians to start a system whereby their employees should not, in the case of old age or infirmity, find themselves unprovided for. From 1864 to 1896 is practically a period of a generation, and during that time the system had become widely extended whereby persons in public or semi-public employ were employed under a system by which they should be able to get an allowance in case of disability for old age; and a number of Acts are to be found where provision is made for officers who retire for reasons of age or ill health. So it was that the Poor Law Officers' Superannuation Act was passed in 1896. To my mind the effect of that Act is plain and clear. Sect. 2 says that the officers or servants to whom the Act applies shall be entitled to superannuation allowance ascertained in the manner that I have indicated, and it provides under s. 12 that "every officer and servant in the service or employment of the guardians of a union shall contribute annually for the purposes of this Act a percentage amount of his salary or wages and emoluments according to the scale laid down by this Act." It appears to me that that Act quite plainly laid upon the guardians the responsibility for providing the allowances to which their servants became entitled. It laid upon the servants the responsibility for

contributing a percentage amount of their salaries or wages or emoluments. I have already read the definition of emoluments, and we have to bear in mind *Rex* v. *Lyon* (1), a case which was decided in the year 1920. In that case the question arose on an Act of the same character—namely, the Asylums Officers' Superannuation Act, 1909. That Act contained words relating to contributions in precisely the same terms as the Act of 1896. In that case, the London County Council, during the war, had paid to their employees in the asylums a gratuity or remuneration because of the increased work which had to fall upon a depleted staff, but in making those payments no deductions were made under the Asylums Officers' Superannuation Act or carried to the fund out of which the superannuation allowances are paid, as the Council were of opinion that such payments were not in the nature of salary, wages or emoluments, but were purely gratuities, and were not subject to deduction. They undoubtedly took that view in the interests of their employees, and they meant to pay the increased sum. They did not wish to burden that sum with percentage deductions, because it might well be that those who had paid the deductions might not live to enjoy an increased superannuation allowance. A writ of certiorari for disallowance and for surcharge of those sums which had not been collected from their employees was applied for, and the committee were surcharged with the sums that they ought to have collected. That was really a very strong case indeed, because the money which ought to have come from the servants of the county council in the asylums—which their servants ought to have paid—was surcharged upon the committee whose duty it was to collect it; and the members of that committee were made responsible for the sums they ought to have collected. It was on this ground (interpreting words exactly similar to those we have to interpret in this case) that it was held that these gratuities or bonuses fell within the words " payments made to any officer as such

(1) [1921] 1 K. B. 203.

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for his own use." So we have this point, that, standing upon the Act of 1896, it is the duty of the guardians to collect and to charge with the percentage a sum which they pay as gratuities or bonuses to their servants, because that sum falls within the definition of "emoluments" in s. 19 of the Act. I think I have pointed out that the Act of 1896 appears to me to lay a definite duty upon both the guardians and upon their servants.

It is said that this Act does not interfere with the freedom of contract between the employees and the guardians—that although the Act of 1864 was permissive upon the guardians, here, under the Act of 1896, the guardians are empowered to establish the fund or a fund, but if they like to make a contract, or if the employee wishes to make a contract, that some portion of the sum he receives, even though it is within the definition of "emoluments," shall not be deducted in contributions for the purpose of the superannuation allowance, but shall stand outside it, that such freedom of contract is not interfered with by the Act. It is said that there are other cases in which you can find that where an Act provides a particular privilege to a private person, it is at the will and discretion of that private person to renounce the privilege which has been given to him, and the maxim is quoted—"Unusquisque potest renunciare juri pro se introducto." Illustrations are offered from the case of *Great Eastern Ry. Co.* v. *Goldsmid.* (1) But we do not need illustrations. It is to be observed that the maxim speaks of "juri pro se introducto." You have to find something which is inserted in the Act for his advantage. I do not think it is possible to read the Act of 1896 as being intended to confer what might be called a private and personal benefit upon individual officers which they can at their will and pleasure renounce. It seems to me that the intention was to put the poor law officers in the same position in which police officers, asylums officers and many other persons have been placed in the interests

(1) (1884) 9 App. Cas. 927.

of the community at large, and that the public should be safeguarded from the melancholy spectacle of seeing a man who had done work and been in a responsible position during years of his life, suffering from poverty and distress by reason of the fact that no adequate provision has been made to enable him to spend his latter years in reasonable comfort.

I think, therefore, that this Act of 1896 must be taken as passed in the interests of the public and not alone in the interests of individuals. Now, that the Act is compulsory, I think appears not merely from its own terms, but that interpretation is made plain by the Poor Law Officers' Superannuation Act Amendment Act, 1897. That Act was passed to enable a female nurse whose period of employment is not long, to be released from the burden and duty of subscribing to a superannuation fund on the ground that, although she may have, as the law then stood, to suffer a reduction, she might not, owing to the nature of her employment, live to enjoy the consequential right of superannuation allowance; and s. 1 says: "Any female nurse appointed after the passing of this Act by any authority to whom the Poor Law Officers' Superannuation Act, 1896, applies, who shall within two months from the date of her appointment signify in writing to such authority her intention not to avail herself of the provisions of the said Act, shall not be required to make any contribution or to submit to any deduction from her salary or wages under the said Act, and shall not be entitled to receive any superannuation allowance, gratuity, or other benefit under the said Act." That Act says this, that the nurse shall not be required, as without this Act she otherwise would be required, to make the contribution and submit to the deduction. It is to my mind a parallel interpretation, if interpretation were needed, of the plain duty which has been imposed by the Act of 1896 both upon the guardians and upon their servants. I ought perhaps to have mentioned that s. 15 of the Act of 1896 itself confirms me in the view that it is a compulsory Act, because s. 15 provides that

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existing officers may renounce the benefit of the Act and remain subject to the Act of 1864. The intention of the Act indicates that the Act of 1896 was obligatory.

Mr. Luxmoore has said that there is no actual prohibition against contracting out such as is found in the Workmen's Compensation Act, and in some other Acts, and that if you do not find prohibition then you may treat the case as it was treated, under the Employers' Liability Act of 1880, in *Griffiths* v. *Earl of Dudley*. (1) The Employers' Liability Act of 1880 took away the defence, which up to that time had been open to an employer, of common employment. Field J. held that all that the Act did was to get rid of a particular defence, and that as a general rule you might take it that entire freedom of contract had been reserved. Whether that principle is quite as plain to-day as it was when it was laid down may be open to question, but I am of opinion that *Griffiths* v. *Earl of Dudley* (1) does not really apply to this case. We have to consider this statute as it stands, and having regard to its terms I think it is plain that it is to be interpreted as a compulsory Act. The observations that I have made as to the interpretation of the Act of 1896 in the light of the Act of 1897 are based upon the reasoning of Lindley M.R. in *Attorney-General* v. *Clarkson* (2) and the observations made by the learned President in that case, who said this, that where the Legislature in one Act "have used language which proceeds upon the hypothesis that a particular interpretation is to be placed upon the earlier Act, I think the judges have no choice but to read the two Acts together, and to say that the Legislature have acted as their own interpreters of the earlier Act." It seems to me unnecessary to do so, because, looking at the 1896 Act alone, it is a compulsory Act, but it appears to me that the Legislature themselves regarded the 1896 Act as being a compulsory Act. I think, therefore, that the plaintiff is entitled to succeed and is entitled to have his pension calculated after the bonus has been taken into account. I am not quite

(1) (1882) 9 Q. B. D. 357. (2) [1900] 1 Q. B. 156, 164-5.

sure what the form of the order ought to be. The action was dismissed. I do not think it is quite plain that a mere arithmetical calculation is sufficient. It may be that the right course is to order an account to be taken, unless agreement or some arrangement shall be come to; because I desire to point out that the position of the guardians must be carefully considered, and that their true position is not merely represented by a payment over the counter to them to-day of a sum which is the total of the contributions which ought to have been paid over a period of some four years, but that it has to be taken from a distance now of something like seven years ago.

WARRINGTON L.J. The plaintiff was for many years an officer or servant of the defendant guardians. In the year 1922, on May 19, he retired from that service by reason of permanent infirmity of body. He thereupon became entitled by virtue of the Poor Law Officers' Superannuation Act, 1896, to receive during his life a superannuation allowance according to the scale provided for by the Act. By that scale the superannuation allowance was to be equal to a certain proportion of the salary or wages and emoluments of the officer or servant during the period specified in the Act. The Act defined the word "emolument" as including "all fees poundage and other payments made to any officer or servant as such for his own use; also the money value of any apartments, rations, or other allowances in kind appertaining to his office or employment." For several years the plaintiff, with the other officers or servants of the guardians, received from them a war bonus in addition to his salary. In calculating the allowance to which he was entitled under the Act of 1896 the defendants have not taken into account the amount of the bonus as part of the salary or wages and emoluments, and, on the other hand, they have not required him to contribute to the common fund in respect of that bonus. The learned judge has found as a fact that that course was pursued as a result of an agreement to that effect made between the guardians and the plaintiff. With that decision of fact I concur.

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The question is whether assuming such an agreement to have been made, it was or was not inconsistent with the provisions of the Act of Parliament. It is admitted, and rightly admitted, that the bonus was an emolument of the plaintiff within the meaning of the definition of the Act of Parliament. If authority were wanted for that, sufficient authority would be found in the case of *Rex* v. *Lyon* (1), which has been referred to by my Lord. It is admitted further, and also rightly admitted, that no distinction can be drawn between the emolument in question and the salary or wages of the officer or servant, and that, therefore, if the learned judge is right, the guardians and the officer or servant of the guardians might together enter into agreement, whether before the commencement, or at any time during the course, of the employment even up to the day preceding his retirement, that he should not be entitled to superannuation allowance given to him by the Act of Parliament. It will be seen, therefore, that the question which we have to determine is a very wide question, and is not confined to the particular point which has arisen in this case, but it involves the decision whether or not it is competent for the guardians and individual officers or servants to contract altogether out of the Poor Law Officers' Superannuation Act, so that the individual officer should not be entitled to claim superannuation allowance. It is unnecessary to go through the actual words of the Act, it is quite enough to say that both with regard to the allowance itself and with regard to the contribution which is to be made by the officers or servants, the Act is, in its terms, imperative. No choice is left either to the guardians on the one hand or to the officers and servants on the other. The officer or servant fulfilling the conditions of the Act is entitled to an allowance calculated on a statutory scale, and, on the other hand, is required to contribute a certain proportion of his salary, wages and emoluments to the fund, out of which not only his allowance, but the allowances of other officers or servants are paid, and the guardians have power, are

(1) [1921] 1 K. B. 203.

directed I think it is, to deduct that contribution from his salary or wages payable to him—that also is imperative. The contribution is to be from time to time deducted from the salary or wages. Now, there is one other circumstance which I think is material, and that is that this Act of 1896 was not the first Act that had been passed on that subject. There was passed in the year 1864 a short Act of Parliament, which empowered the guardians at their discretion to grant a superannuation allowance to a retiring servant, but the grant of that allowance was wholly in the discretion of the guardians. It seems to me that when you bear in mind that fact, and when you look at the wording of the Act with which we have to deal, it indicates that there has been a change between the year 1864 and the year 1896 in the view of the Legislature with regard to this subject, and that by the year 1896 for general public reasons it was thought to be desirable to introduce a definite scheme applicable to all public officers and servants of this description, by which in the event of retirement by reason of permanent impairment of mind or body or old age, the rest of their lives should be provided for by the superannuation allowance to which they were entitled. Now if that is so, it is impossible, to my mind, to read the provisions of the Act as merely conferring a particular benefit upon the individual servant by himself. It is intended to be a benefit conferred upon a certain class of public servants as a whole; that it is not such a benefit that one public servant of that class could renounce by means of arrangement between himself and the guardians; for if that were once admitted, it might result in a practical repeal of the Act altogether with reference to a particular body of guardians and their employees or servants; at any rate it would put the guardians in the position of negotiating with an officer or servant to make him stipulate that he should not require the payment of a superannuation allowance. Now, it seems to me that it is impossible to suppose that the Legislature, by passing an Act of this nature, intended to leave the parties open to relieve themselves of the mutual obligations imposed for the

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purpose of securing that superannuation allowance. But the matter does not stop there. There is the indication in the Act itself, if any such indication was required, that it was intended to be compulsory on all officers and servants, and that is without any reference to the individual will or desire. That is to be found in s. 15, which enables the then existing officers and servants of the guardians to exempt themselves, on the one hand, from making the contribution required under the Act, and on the other, to deprive themselves of the right to receive the allowances; and by the Act passed in the subsequent year, similar provision is made with regard to the class of female nurses employed by the guardians, who were also given an option, under certain conditions, of relieving themselves from the liability to contribute, and at the same time renouncing any claim to superannuation allowance. Now those two Acts, s. 15 of the 1896 Act, and the 1897 Act, seem to me to strengthen, if any such reinforcement was required, the view which I have expressed with regard to the actual operative sections of the Act of 1896 as to these allowances. But the matter does not stop there. The Act of 1896 provides, in s. 10, that "Every superannuation allowance granted under this Act shall be payable to or in trust for the officer or servant, and shall not be assignable or chargeable with his debts or other liabilities." That is to say that it was to be a personal inalienable provision for the retired officer or servant during the remainder of his life after his retirement. If the defendants are right, any officer or servant, up to the last moment before his retirement, might assign to them in shape of a release—because I can see no distinction between a release to the person who has to pay and an assignment to a third person—and so it would be possible for the servant to deprive himself of the superannuation allowance. It seems to me to be too absurd to suppose that the Legislature had provided this inalienable provision for the retired servant, and yet left him at liberty, up to the moment before he retired, to deprive himself by bargain with the guardians of that provision. In my opinion,

therefore, on the construction of this Act, whatever may be the proper construction of other Acts of Parliament, Parliament did intend that this allowance should be paid on the statutory scale, and did not leave it open to the guardians and the particular servant to contract, either that there should be no allowance, or, as in the present case, that the allowance should not be calculated upon the scale laid down by the Act of Parliament, but upon some other scale.

Now reliance was placed, before Astbury J., on the case of *Griffiths* v. *Earl of Dudley*. (1) In my opinion, that case and the present are poles asunder. In that case the Employers' Liability Act of 1880 had made an alteration in the law with regard to the position of masters and servants in reference to common employment. Until the passing of that Act the defence of common employment could be set up by the employer to a claim for damage for injury met with by a workman where those damages resulted from the act of a fellow servant, and the Act of 1880 made an alteration in the general law on that subject by providing that in certain cases the defence of common employment should not be open to the master. I am not using the words of the Act, but that is the effect of it. That Act merely altered the general law, and there was nothing in the provisions of the Act to prevent a particular servant from contracting that the old law should apply to him, and, in fact, there might be, in many cases, every reason why, as Field J. pointed out, it might be to his benefit so to contract. It merely gave him a right which he could insist upon if he pleased, and, therefore, it was held in that case in regard to a contract made by a workman that, in effect, the defence of common employment should, notwithstanding the Act, be open to the master, was one binding on the workman and capable of being enforced. But that was of a totally different nature to the present Act, and it seems to me that the decision of *Griffiths* v. *Earl of Dudley* (1) is no authority on which we could decide against the plaintiff in the present case.

(1) 9 Q. B. D. 357.

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It seems to me, therefore, that the plaintiff, notwithstanding the agreement which the learned judge has found, was entitled to have his superannuation allowance calculated in accordance with the Act—that is to say, giving to him a proportion of all his salary, wages and emoluments as provided by the Act, including in those emoluments the amount of war bonus which he received—and that he was under a liability, notwithstanding the agreement, to contribute in respect of the bonus the 2 per cent. provided for by the Act.

I think, therefore, that the decision of Astbury J. must be set aside, and that the plaintiff must have the relief asked by the statement of claim, which, I think, in substance is correct, but that is open to discussion. What is asked is a declaration, and an account of the money due to him founded upon that declaration, and, in my opinion, he is entitled to the costs here and below. But to the declaration should be added the words "subject to the obligation of the plaintiff to contribute to the common fund, as provided for by the Act."

SARGANT L.J. I am of the same opinion. On the question whether the plaintiff purported to contract not to claim an increased superannuation allowance so far as such increase would be based on the war bonuses paid to him, I need say nothing, except that I agree with the learned judge and the other members of this Court that the facts completely justify the inference that the appellant did purport to make such a contract. The only question to consider now is whether the contract was one capable of being made by the plaintiff.

That depends on the true view of the Act of 1896. It is admitted by the respondents, in view of the decision in *Rex* v. *Lyon* (1), that the war bonuses in question were emoluments within the meaning of s. 3 of the Act of 1896, and the respondents accepted the position that these bonuses cannot stand on any different footing from the ordinary payments of salary. Their contention is that an officer is

(1) [1921] 1 K. B. 203.

not prohibited by the Act from making a special bargain with the guardians under which he may entirely part with the whole or part of the bonus to which he would otherwise be entitled. In my opinion, that contention is inconsistent with the general purpose and the true interpretation of the Act. The Act, in my view, constitutes a new scheme binding both on the guardians and each of their officers, under which a definite inalienable provision is constituted for the personal support of the superannuated officers of the guardians. It is a scheme under which a common fund is created partly by contributions by the guardians and partly by contributions of the officers themselves, and there is no separation of the contributions of any particular officer. He has no more interest in his own contributions than in those of any other officer, or than in those of the guardians; and that the rights under the Act cannot be waived or compounded for by bargain to the contrary between the guardians and the officer is indicated by the special exemptions, or exceptions, introduced by s. 15 of the Act itself, and by the subsequent Act in the following year, and also, most important of all, I think, by the terms of s. 10 of the Act itself. Mr. Luxmoore and Mr. Turner have sought to draw fine distinctions between assigning to a third person and a release or waiver as between the guardians and the officer. They say that the pension could not be assigned to a third person either before or after accruer, but that as towards the guardians it may be waived or released, either initially or at any time before actual accruer, and perhaps even after accruer. It seems to me these distinctions are too fine, and that to preserve the inalienability of the pension, which is what I think is meant by s. 10 of the Act, it is necessary to prohibit a release by bargain with the guardians just as much as an assignment to a third person. And it is to be noted that if this were not so, the guardians of a particular union might render the Act a complete dead letter so far as they were concerned. They might make it a term of the employment by them of any officer who sought to be employed that he should make a bargain under which he should waive

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and give up any right to a pension, or any right to a pension in respect to a part of his salary or emoluments. They might do that which was attempted to be done in a somewhat similar case of *Thornely* v. *Lord Leconfield* (1), and I cannot think the purpose of an Act which was passed with this very obvious intention should be allowed to be stultified by enabling the guardians to give it the complete go-by in this way, especially when it has to be considered that this is an Act which is administered from the central source, and with regard to which it is of great importance that there should be unity of practice in the different localities which are concerned with its prima facie administration.

I will only add a few words as to the two cases that were relied on by the respondents. Both the decision and the observations in *Griffiths* v. *Earl of Dudley* (2) seem to me really to be of no assistance in the present case. Reasons for this have been given by Warrington L.J., and I concur in those reasons, but I should like to add this, too, that the judgment, when it is carefully considered, does not cast doubt on the principle that there may be indications or implications in the Act which prevent contracting out; and what we have to consider is whether there are such indications here sufficient for the purpose? In my opinion, for the reasons I have given, I think that there are, and I think that indications or implications of that kind, which might not have been sufficient fifty years ago, may be much more readily considered sufficient at the present day, in Acts passed within the last thirty years, having regard to the general tendency of legislation to ignore the extraordinary sanctity of freedom of contract. Then, as regards *Great Eastern Ry. Co.* v. *Goldsmid* (3), it seems to me that that case is even more remote, and I rather wonder it was cited at all, because, when it is once looked at, the decision only comes to this, that when there is a grant by an Act of Parliament which is equivalent in its effect to a private grant between private persons, the estate, or rights arising under that private grant,

(1) [1925] 1 K. B. 236; 40 Times L. R. 143.
(2) 9 Q. B. D. 357.
(3) 9 App. Cas. 927.

may be waived or modified just as much as rights or estates under a private agreement.

I think, therefore, that that decision really ought to be considered as one entirely inapplicable to the present case.

Appeal allowed.

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Solicitors: *Howard & Veneer; Reid Sharman & Co., for Foyster, Waddington & Morgan, Manchester.*

R. M.

THE SOCIETY OF MOTOR MANUFACTURERS AND TRADERS, LIMITED *v.* MOTOR MANUFACTURERS' AND TRADERS' MUTUAL INSURANCE COMPANY, LIMITED.

[1924. S. 1916.]

C. A. 1925 LAWRENCE J. *Jan.* 30; *Feb.* 3, 4, 5, 26. C. A. *May* 6, 7.

Trade Name—Injunction—Similarity of Names—Risk of Confusion or Injury.

A company, carrying on the business of insurance against motor risks, adopted as part of its name the ordinary descriptive words "Motor Manufacturers and Traders," which had already been adopted as part of its name by a society having for its main objects the promotion, encouragement and protection of the motor trade generally. There was no charge of fraud and in the opinion of the Court no tangible risk of injury to the society's business reputation owing to the similarity of the names; the names being sufficiently distinguishable and the defendant company's business wholly different from that of the plaintiff society:—

Held, by the Court of Appeal (adopting and affirming the judgment of Lawrence J.), that the plaintiff society was not entitled to a monopoly of its descriptive words, or to any relief against the defendant company.

WITNESS ACTION.

The following facts are, in substance, taken from the judgment of the Court.

The plaintiff society was incorporated in 1902, as a company limited by guarantee without any share capital, under the name of "The Society of Motor Manufacturers and Traders, Ld." It was essentially a trade protection society, and did not itself engage in or carry on any manufacture or trade. Its principal objects, as stated in its memorandum of

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association, were to encourage, promote and protect in the United Kingdom and abroad the motor trade and generally to watch over and protect the general interest of companies, firms and persons engaged in the motor trade, but independently of their personal interests.

The society was the foremost of its kind in England and had acquired a great reputation both in this country and abroad. It had a large number of members, including nine or ten well-known insurance companies, which undertook assurance business connected with all kinds of motor risks. The society's activities included the promotion and conduct of the principal motor exhibitions in London. It published and circulated amongst its members a register of the motor trade. In connection with the various exhibitions which the society organized it was in the habit of effecting a considerable number of policies of insurance in various insurance companies chiefly against loss by fire and theft, paying upwards of 2000*l.* per annum for insurance premiums. There were three classes of members: first, honorary members, who needed no qualification and paid no entrance fee or subscription; secondly, ordinary members, who, besides requiring certain qualifications, had to pay an entrance fee of fifty guineas and an annual subscription of ten guineas; and thirdly, associate members who, besides requiring certain qualifications, had to pay an entrance fee of five guineas and an annual subscription of five guineas. The direction of the society's affairs were in the hands of a council consisting of a president and forty-five other persons, and its business was managed by a committee of management and by various sectional committees.

In April, 1924, the defendant company was incorporated as a company limited by shares under the name of "Motor Manufacturers' and Traders' Mutual Insurance Company, Ld.," with a capital of 50,000*l.* divided into 50,000 shares of 1*l.* each. Its main objects were to undertake certain classes of insurance consisting mainly of insurances against risks connected with motor cars, motor cycles and other motor vehicles. Owing to the prevailing custom of

nicknaming companies by their initials the plaintiff society had become known as S.M.M.T. and the defendant company had already begun to call itself and was becoming known as M.M.T.M.I. It appeared that, shortly after its incorporation, the defendant company sent out a circular to various motor manufacturers and traders in the United Kingdom describing its methods of business and offering, not only a commission, but also participation in profits (in the shape of preference shares) for the introduction of business. It further appeared that a statement was made by the defendant company's City managers, in a circular issued by them to the motor trade, that their services would be at the disposal of the persons circularised at the then forthcoming motor exhibition at Olympia in order to discuss the defendant company's insurance scheme: but it was admitted that it was the custom of insurance companies, none of which were connected with the plaintiff society (except possibly as members), to send representatives to the exhibitions in order to obtain insurance business: and no suggestion was made that the defendant company was holding itself out as a member of the plaintiff society or that any such holding out would expose the credit or business reputation of the society to any risk of damage.

The registration of the company having come to the notice of the plaintiff society, that society consulted its solicitors, who, on May 2, 1924, wrote to the defendant company as follows: "We are instructed on behalf of the Society of Motor Manufacturers and Traders, Ld., to inform you that our clients have only just heard of the incorporation of your company under the name of 'Motor Manufacturers' and Traders' Mutual Insurance Company, Ld.' Our clients take a very strong view that the similarity of the two names must lead to confusion and the belief that your company is in some way connected with our clients, and we are instructed to request you to give us an undertaking to take steps to change the name of your company without delay in such a way that no confusion can arise. Failing a receipt of an undertaking from you by Thursday morning next to the

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above effect, our clients propose to take such proceedings as they may be advised." The defendant company referred that letter to their solicitor, who on the same day sent the following letter in reply: "My clients" (naming the defendant company) "have handed me your letter to them of to-day's date with instructions to reply thereto. In the first place, I must call your attention to the fact that you have misquoted the title of my clients' company and the difference, though seemingly slight, is not without its importance. The titles of the two companies seem to me so different that I cannot see any chance of any confusion arising, and I cannot therefore advise my clients that there is any reason why they should alter their title. It is obvious that your clients can have no copyright in the words 'Manufacturers and Traders,' and my clients' title shows that they are an Insurance company limiting their operations to this particular class of traders and manufacturers and nothing else. If your clients however think fit to commence proceedings, I will accept service on behalf of my clients."

On May 5, 1924, the plaintiff society (hereinafter called the society) issued the writ in this action, claiming an injunction to restrain the defendant company (hereinafter called the company) from carrying on business under its registered name or under any other name comprising the words "Motor Manufacturers and Traders" or other similar words likely to mislead the public into the belief that the company was connected with the society or that the business of the company was the business of or in some way connected with the business of the society. The statement of claim, which was delivered on July 10, 1924, contained no allegation that the name of the company was chosen with the intent to deceive or mislead or that the company was guilty of fraud in continuing to use its name after the letter of May 2, 1924.

The secretary of the society was called on its behalf, and admitted that the name taken by the company would not involve the society in any pecuniary liability nor have the effect of diverting any customers from the society. He

also admitted that the company had done nothing either to cause confusion between the business carried on by it and the business carried on by the society or to affect the credit or reputation of the society. He did, however, suggest that the name chosen by the company might mislead the public concerned into the belief that the society had encouraged the formation of and was asking its members to put their business through the company, with the result that if the company were to be wound up any person who had insured in it on the faith of such a connection might turn round on the society and complain that it ought to have stopped the use of the name or, at least, ought to have publicly dissociated itself from the company. He further stated that it was within the bounds of possibility that the society might be asked by its members to promote a company to carry on an insurance business on the lines of the business carried on by the company and that, if the society were to accede to such request, it might want to use the name chosen by the company. In addition to the secretary, several trade witnesses were called who gave evidence as to the impression produced upon their minds upon first seeing the company's name and after reading the company's circular and advertisement, which was that the defendant company was in some way associated with the plaintiff society.

The action came on for hearing before Lawrence J. on January 30, 1925.

Luxmoore K.C., *Owen Thompson K.C.* and *W. P. Spens* for the plaintiff society. We do not contend that there is such similarity between the names as would cause the defendant company to be mistaken for the plaintiff society. But, as the company appeals to the same class of traders as the society, that is, to motor manufacturers and traders, the similarity of the names is calculated to deceive either by diverting customers from the society to the company or by creating confusion between the two, as, e.g., by suggesting that the defendant's business is a branch or agency or otherwise connected with the society's operations : *Ewing* v.

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Buttercup Margarine Co. (1) The title which the company has adopted and the circulars and advertisements it has issued are calculated to lead to confusion and to mislead the motoring public into thinking there must be some connection between the two bodies. The Court, too, will have regard to what may happen in the future, if the plaintiff society were to be minded to carry on an insurance business: Kerly on Trade Marks, 5th ed., p. 584. There is a reasonable probability of the company acquiring some benefit from the plaintiff society's reputation in the motor world by the continued use of the words "Motor Manufacturers and Traders" as part of their title, and such a tangible risk of injury to the plaintiff's trade reputation, in case the company were to be wound up or become insolvent or otherwise suffer in prestige, as to entitle the plaintiff to the relief claimed: *Lloyd's* v. *Lloyd's* (*Southampton*), *Ld.* (2); *Harrods Ld.* v. *R. Harrod Ld.* (3)

Upjohn K.C. and *Beebee* for the defendant company. It has not been proved but merely conjectured that the names might lead to confusion between the defendant company and the plaintiff society. The circular sent out by the company does not suggest that the company is encouraged by the society. If that were really the case, the defendant company would use that fact as its trump card. Such similarity as exists between the two titles is not, in the circumstances, calculated to lead to any confusion. The society is pre-eminent and unique in this country and its operations extend to foreign countries as well. There is no risk of injurious competition. It does not carry on any business in insurance and its articles do not authorize it to do so, nor is there any evidence that the society has any intention of carrying on insurance business. Even if the society had power to carry on such a business as the company is carrying on, it would not matter, because it is only material to consider what business the society is actually carrying on now, and the mere circumstance that it might carry on insurance business

(1) [1917] 2 Ch. 1. (2) (1912) 29 R. P. C. 433.
(3) (1923) 41 R. P. C. 74.

at some future time is no ground for granting relief: *Scottish Union and National Insurance Co.* v. *Scottish National Insurance Co., Ld.* (1) Even assuming some confusion, the reputation of the society would not suffer from any adversity which might happen to the defendant company, since, according to their own evidence, they are pre-eminent. They are not entitled to a monopoly of the words "Motor Manufacturers and Traders," which are words merely descriptive of the business which the company carries on and are never used without the additional words "Mutual Insurance." The facts in the cases relied on by the plaintiff were entirely different from the facts of the present case. In *Ewing* v. *Buttercup Margarine Co.* (2) the defendants were using the plaintiffs' fancy trade name and were restrained from so doing on the ground that such user was calculated to divert custom from the plaintiffs to the defendants and to suggest that the defendants' business was an extension, branch or agency of the plaintiffs' business. In *Lloyd's* v. *Lloyd's* (*Southampton*), *Ld.* (3), there was an "impudent attempt" to obtain by the use of the name Lloyd's some benefit from the reputation which that name carried in the shipping world. *Harrods Ld.* v. *R. Harrod Ld.* (4) was a case similar to the last and was a case of the fraudulent use of another man's name in order to appropriate part of the reputation of the plaintiffs' business. The case of *Walter* v. *Ashton* (5) was one of fraud; the Court of Appeal in *Harrods'* case thought the decision in *Walter* v. *Ashton* (5) was founded on too narrow a ground, that it was not necessary to prove a pecuniary liability, but that injury to trade reputation was sufficient ground for the Court's interference. The company appeals for custom to motor manufacturers and traders and the society is not entitled to a monopoly in those words, so as to deprive the defendants of the use of words which are merely descriptive of their business: *Colonial Life Assurance Co.* v. *Home*

(1) (1908) 26 R. P. C. 105, 111.
(2) [1917] 2 Ch. 1.
(3) 29 R. P. C. 433.
(4) 41 R. P. C. 74.
(5) [1902] 2 Ch. 282.

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and Colonial Assurance Co. (1) The company is carrying on a different business from the society, and there is not sufficient similarity between the two names to necessarily lead to the inference of intention to deceive: *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank* (2); *Aerators, Ld.* v. *Tollitt* (3); *Cellular Clothing Co.* v. *Maxton.* (4) In *Army and Navy Co-operative Society* v. *Army, Navy and Civil Service Co-operative Society of South Africa* (5) there was evidence of persons having thought that the defendant society was an offshoot of the plaintiff society, and, further, that there was some likelihood of persons thinking that the defendant society was an amalgamation of the plaintiff society with the Civil Service Co-operative Society. In the present case there is, on the evidence, no reasonable probability of the business of the company being confused with that of the society. A defendant trader may adopt as part of his title the name of the article in which he deals without involving an inference against the bona fides of the defendant: *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.* (6) In *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.* (7) the measure of similarity established was not sufficient either in regard to the names employed or to the objects of the trade sought to be carried on: and the fact that a thoughtless person might unwarrantably jump to the conclusion that the two companies were connected was not enough to render the respondents liable to have their business stopped unless they changed their name. To entitle a plaintiff to succeed he must prove damage; it may be injury to property in the broadest sense of the word. In cases of fraud the Court is more ready to impute damage: in the absence of fraud the plaintiff may still sue on the ground of property if the defendant is adopting a name the result of which will be to lead customers to go to the defendant when they intended

(1) (1864) 33 Beav. 548.
(2) (1878) 9 Ch. D. 560.
(3) [1902] 2 Ch. 319.
(4) [1899] A. C. 326.
(5) (1902) 19 R. P. C. 574.
(6) [1907] 2 Ch. 312, 328, 329.
(7) [1907] A. C. 430, 438.

to go to the plaintiff to trade: per Buckley J. in *Army and Navy, &c.* v. *Army, Navy and Civil Service, &c.* (1)

Owen Thompson K.C. in reply. The words appropriated by the defendant company as part of its title are calculated to deceive. No witness was called on behalf of the defendant company to explain how its name came to be chosen: the Court will draw the inference that the selection of the words was not due to chance, but to deliberate design, and that it must have been worth the defendants' while to select those particular words, in order that the company might be associated with the society, and thereby reap some advantage from the latter's great reputation. And the corresponding result would follow from that association, that any slur on the company's credit or reputation would be reflected on the reputation of the society in an infinite variety of ways, as, e.g., by loss of subscriptions and popularity at the motor shows: *Ewing* v. *Buttercup Margarine Co.* (2) The Court has power to protect against loss attributable to injury as well to trade reputation as to any other property of the society: per Sargant L.J. in *Harrods Ld.* v. *R. Harrod Ld.* (3) In *Lloyd's* v. *Lloyd's* (*Southampton*) (4) the defendants were not carrying on or threatening to carry on the business which the plaintiffs as Lloyds' agents were carrying on at Southampton, but nevertheless they were restrained from carrying on business under a name calculated to induce the belief that their business was the business or an agency of the plaintiffs' business. The matter does not depend entirely on positive evidence of confusion by similarity of names resulting in injury; but the Court will draw its own inferences, and although a name may have been adopted innocently, a defendant will be restrained if the name is calculated to suggest that the defendant's business is in some way connected with the plaintiffs' business, with the result that, in certain events, the plaintiff might suffer in credit or otherwise: *Ewing* v. *Buttercup Margarine Co.* (2) The necessity of evidence of confusion is not so

(1) 19 R. P. C. 576.
(2) [1917] 2 Ch. 1.
(3) 41 R. P. C. 74, 87.
(4) 29 R. P. C. 433.

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great in the case of similarity of names as it is in the case of similarity of chattels, where the resemblance appeals to the eye: *London General Omnibus Co.* v. *Lavell.* (1) The risk of exposure to litigation through being mistaken for the defendant is enough to justify the Court in granting relief: *Walter* v. *Ashton.* (2) In *Colonial Life Assurance Co.* v. *Home and Colonial Assurance Co.* (3) the defendant was, in effect, claiming a monopoly in the single word "Colonial" and in *Merchant Banking Co. of London* v. *Merchants' Joint Stock Bank* (4) only the single word "Merchant" had been appropriated. This is not a case of describing the article dealt in (as, e.g., an aerator or vacuum cleaner), as in *Aerators, Ld.* v. *Tollitt* (5), and in *British Vacuum Cleaner Co.* v. *New Vacuum Cleaner Co.* (6) And it cannot be claimed that the title adopted by the defendant is the only means of describing the business it carries on. The plaintiff does not claim a monopoly of the words "Motor Manufacturers and Traders," which it is admitted are words of common use in the English language, but the adoption by the defendant of those words in the same combination is as much calculated to lead to confusion and to deceive as if the defendant had appropriated a fancy trade name used by the plaintiff society. Both the defendant and the plaintiff appeal to the same class of customers—namely, motorists.

Feb. 26. LAWRENCE J. [after stating the facts, continued:] In my opinion it would not be right, after counsel for the defendant company had closed their case relying expressly upon the absence of any charge of want of good faith either in the pleadings or at the Bar, to draw any inference against the bona fides of the defendant company merely because no witness had been called on its behalf.

In the circumstances, I consider it the duty of the Court to negative fraud, unless the choice of name or the refusal to change the name is incapable of an innocent explanation.

(1) [1901] 1 Ch. 135.
(2) [1902] 2 Ch. 282.
(3) 33 Beav. 548.
(4) 9 Ch. D. 560.
(5) [1902] 2 Ch. 319.
(6) [1907] 2 Ch. 312, 328, 329.

In my opinion it is possible to account for the choice of the defendant company's name without imputing fraud to the promoters of the defendant company. They may have thought the name a suitable one by which to describe the business which the defendant company was about to embark upon and, even if the particular combination of words suggested itself to their minds because the plaintiff society had used such a combination, it does not necessarily follow that they had any intention of thereby obtaining for their company any advantage from the reputation of the plaintiff society. They may have thought that, as the business which the defendant company was about to embark upon was clearly indicated by its name and was entirely different from the business carried on by the plaintiff society, no confusion would result from the use of the words complained of. The refusal by the defendant company to change its name when requested by the plaintiff society is quite consistent with a legitimate claim to the right to retain the name.

In the result I have come to the conclusion that neither the original choice of name nor the subsequent refusal to change it was necessarily fraudulent, and that consequently no fraud ought to be imputed to the defendant company. The only question to be decided, therefore, is whether as a matter of fact the defendant company's name so nearly resembles that of the plaintiff society as to be calculated to deceive.

This question falls to be determined by an appeal to the eye and ear coupled with a proper consideration of the surrounding circumstances and of the evidence of persons who have come into contact with the plaintiff society's name. In arriving at a conclusion in the present case it is important to bear in mind first, that this is not a case of fraud; secondly, that the business of the defendant company is altogether different from and in no way competes with the business of the plaintiff society; and, thirdly, that the name of the plaintiff society is descriptive and consists entirely of words in ordinary use in the English language. Very many cases dealing with disputes similar to the one which has

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arisen in the present case are to be found in the reports, and a number of such cases have been cited at the Bar, but I do not intend to go through them, as the principles applicable to cases of this kind are not in dispute and as the decision in each case depends upon the particular facts.

For the purposes of this judgment it is sufficient to state that it is well established that a Court of equity will protect the business reputation enjoyed by any person or corporation against tangible risk or probability of injury, just as it will protect any other property of such person or corporation against any such risk or probability. One of the ways in which a business reputation may be injured is by the appropriation by a stranger of part of such reputation. Such appropriation may be brought about by the adoption of a name which suggests that the person or corporation adopting it is in some way connected or associated with the person or corporation enjoying the reputation.

Damage or likelihood of damage to property is the gist of all such actions and, unless a plaintiff can prove that his credit or business reputation has suffered damage or that there is a tangible risk or probability of his credit or business reputation suffering damage, no action will lie. In cases of fraud the Court will readily assume that the defendant has succeeded or will succeed in accomplishing that which he has set himself to accomplish, and in such a case the onus of proof of damage or of likelihood of damage is, speaking generally, not heavy.

Where, however, there is no fraud and where a company has adopted a purely descriptive name the onus of proving that another company, by adopting a somewhat similar descriptive name, is exposing the credit or business reputation of the former company to risk or probability of injury, the onus is in my opinion a very heavy one; in such a case the Court must take care not to exercise its jurisdiction so as to confer upon the plaintiff company a monopoly greater than that to which it is entitled. Under the Companies Acts a company by registering its name gains a monopoly of the use of that name, since no other company can be registered

under a name identical with it, or so nearly resembling it as to be calculated to deceive; but the very fact that the Legislature allows a descriptive name to be registered casts a duty on the Court to ensure that no company by registering such a name acquires a greater monopoly of the use in trade names of any words or combination of words in ordinary use than the Legislature has conferred on it.

In the present case it is not suggested that the use by the defendant company of its registered name would cause the public concerned to mistake the defendant company for the plaintiff society or would cause any customers of the plaintiff society to be diverted to the defendant company; but what the plaintiff society alleges is that its credit or business reputation is likely to be affected, because the name of the defendant company suggests that the defendant company is in some way connected or associated with the plaintiff society, and that therefore the latter's business reputation would be injured, if the defendant company were to be wound up or to dispute its policies of assurance or otherwise to refuse to honour its obligations.

Having regard to the facts which I have stated and judging merely by eye and ear I am of opinion that the defendant company's name is not calculated to deceive in the manner alleged by the plaintiff society. The words "The Society of" which precede the words "Motor Manufacturers and Traders," in my opinion, are not only a prominent and distinctive feature of the plaintiff society's name both when written or printed and when spoken, but are also in a great measure indicative of the fact that it is a trade protection society and not a trading company. The absence of these words from the defendant company's name and the addition thereto of the words "Mutual Insurance Company" in my opinion serve to distinguish the defendant company's name and the character of its business sufficiently from the plaintiff society's name and business so as not to convey the suggestion that the two companies are connected or associated with one another.

The question then arises whether there is anything in the

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evidence adduced at the trial which displaces the prima facie opinion which I have formed from a mere comparison of the two names.

The plaintiff society placed reliance upon the fact that owing to the prevalent fashion of calling companies by their initials it had become known as the S.M.M.T., and that the defendant company had already commenced to call itself and would no doubt in time become known as the M.M.T.M.I. I am of opinion that the distinction between the two names is even more apparent when initials are used than when the names are written out at length and that this point has no substance in it, and speaking generally, I have not found anything in the circulars and advertisements of the defendant company (all of which have been submitted to a careful scrutiny) which could properly be said to convey the suggestion that the defendant company is in some way connected with the plaintiff society.

[His Lordship then dealt with the oral evidence given at the trial by the secretary of the plaintiff society, and after describing that witness's suggestion that the plaintiff society might possibly be asked by its members to promote a company to carry on an insurance business on the lines of the business carried on by the defendant company, in which case it might want to use the name chosen by the defendant company, as somewhat fantastic, continued :] Even if the plaintiff society had the power to promote any such company, which I do not think it has, the idea that the plaintiff society should promote and financially support a company to carry on an insurance business seems to me to be fundamentally opposed to the aims and objects of the plaintiff society. For one thing, it would mean entering into competition with those of its members who were insurance companies or were agents for insurance companies. Besides, this Court would never restrain the use of a trade name at the instance of a trader merely because that trader might at some future indefinite date want to start a new business and use that name in connection with such business.

The secretary's apprehension that persons might insure

with the defendant company in the belief that it was connected with the plaintiff society and might thereafter complain if the defendant company were to become insolvent seems to me to be visionary and to lack any real foundation. If a person wanted to insure with the defendant company, because he believed it was responsibly connected with the plaintiff society, it is not unreasonable to assume that before taking out his policy of insurance he would ascertain by inquiry, either from the plaintiff society or from the defendant company, whether there were any foundation for his belief. [His Lordship then proceeded to examine the evidence given by the trade witnesses who were called at the trial and continued :] Taking the evidence of these trade witnesses as a whole, it is in my opinion so weak as to be almost negligible. Even accepting the position that some of them as the result of a casual glance at the name may have thought that there might be some connection between the defendant company and the plaintiff society, I am convinced that not one of them would have remained undeceived, if he had taken the trouble to read the circulars or advertisements of the defendant company, much less if he had seriously entertained the idea of effecting an insurance with the defendant company and had got into touch with its officers for that purpose.

In my opinion the language used by Lord Low and quoted with approval by Lord James of Hereford in *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.* (1) exactly fits this case, I therefore make no excuse for adapting it as follows : any one who took the trouble to think about the matter would see that the defendant company was an insurance company and that the plaintiff society was a trade protection society, and I do not think that the defendant company is liable to have its business stopped, unless it changes its name, simply because a thoughtless person might unwarrantably jump to the conclusion that it is connected with the plaintiff society. Moreover, such confusion, if any, as may have arisen or as is likely to arise in the future is due entirely to the fact that the plaintiff society has chosen such common descriptive

(1) [1907] A. C. 430, 438.

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words as "Motor Manufacturers and Traders" as part of its name. If the plaintiff society were to succeed in this case, it could only be on the ground that it had acquired a monopoly of the use in trade names of the words "Motor Manufacturers and Traders," and could therefore prevent any company from using those words as part of its name whatever addition it might make to those words and whatever trade or business it might carry on. In my opinion, the plaintiff society is not entitled to any such monopoly. Nor has the evidence convinced me that the plaintiff society's credit and business reputation is likely to suffer the slightest injury by reason of the adoption by the defendant company of the name which it now bears.

In the result, I hold that the plaintiff society has failed to prove any such tangible probability of injury to its credit or trade reputation as would entitle it to the relief claimed in this action. I therefore dismiss this action with costs.

H. C. H.

C. A.

The plaintiffs appealed. The appeal was heard on May 6 and 7, 1925.

Luxmoore K.C. and *Spens K.C.*, for the appellants, repeated the arguments put forward by them in the Court below.

Upjohn K.C. and *Bcebee* for the respondents.

POLLOCK M.R. We need not trouble you, Mr. Upjohn. I think that this appeal must be dismissed with costs. I do not think that it would be useful, nor is it necessary, to recount the facts or to repeat the law applied to them by Lawrence J., for I desire to accept both from his judgment. With regard to the law, the learned judge has recalled the words which were used by Lord James of Hereford in the case of *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.* (1), when he referred to the words from the judgment of Lord Low, the Scottish judge, in which he said: "Any one who took the trouble to think about the matter would see that the respondent company was a motor company and the

(1) [1907] A. C. 430, 438.

complainers a tyre company. I do not think that the respondents are liable to have their business practically stopped unless they change their name simply because a thoughtless person might unwarrantably jump to the conclusion that they were connected with the complainers." That passage to my mind embodies not only good sense but also good law, and was rightly used by Lawrence J. as a touchstone to apply to the facts of this case. Perhaps one might add that the passage cited applies with all the more force where, as in the present case, the defendants use plain, and it may be necessary, words of the English language to describe the persons whose mutual assurance they desire to effect.

I desire to say one word with regard to the observations I made in my judgment in *Harrods Ld.* v. *R. Harrod Ld.* (1), in respect of which Sargant L.J., in giving his judgment, usefully entered a caveat if they were intended to mean what ex facie they might mean. I was dealing in that case with the position that arose from what Byrne J. said in the case of *Walter* v. *Ashton* (2)—namely, that you must show some probable risk of injury by what has been done. I do not desire to suggest that that was wrong. What I intended to say, in referring to Sir George Jessel's wider phrase, was this, that in the passage I quoted just above Sir George Jessel had said that in a case where there was fraud, the law was strong enough to prevent it, that is to say that where there is fraud in representing that his business is the business of another man, in that case there would be implied or deduced from that fact probable risk of injury to the plaintiff. Hence Byrne J. in his words must not be taken to have overlooked the case of which Sir George Jessel spoke, where injury would be implicit, although it might not be proved. I was dealing with the two passages as contrasted, but not intending to indicate at all that it is unnecessary to show some probable risk of injury.

WARRINGTON L.J. I am of the same opinion. I am quite content to accept the judgment of Lawrence J. as

(1) 41 R. P. C. 74. (2) [1902] 2 Ch. 282.

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correct; and also to accept as my own his reasons for his conclusion. In my opinion there is no tangible risk of any person of ordinary common sense coming to the conclusion that this insurance company is promoted by or otherwise connected with this great and important trade protection society. I am further of opinion that there is no evidence that if a certain number of persons should arrive at such an improbable conclusion, there is any tangible risk of the reputation of this society of apparently high reputation in the trade being so affected as to suffer pecuniary loss or damage. I agree that the appeal should be dismissed with costs.

SARGANT L.J. I agree. I think this is the old, old story. The plaintiff society have taken the name containing words descriptive of the area of their operations. They have been very successful. Those words of general description have become associated to a considerable extent with the individuality of the plaintiff society. Therefore, the society wishes to push the result of this association the usual step further, and to obtain a monopoly of the descriptive words in question by asserting that nobody can use those descriptive words as a permanent part of its title, because those words will not be read by the public as used for their ordinary purpose of description, that is to show the persons with whom the defendants desire to deal in the way of business, but will be read as referring to the plaintiffs, and as connoting some connection between them and the defendants. This further step should not be allowed.

But beyond this I think the risk of any possible danger or damage to the plaintiffs on the evidence is extremely remote; and, if it arises at all, it arises from the plaintiffs having used those four words of general description. I cannot see that there is any sufficient foundation for granting relief to the plaintiff society.

Appeal dismissed.

Solicitors: *Kenneth Brown, Baker & Baker; Douglas W. Money.*

R. M.

In re APPLICATION OF F. REDDAWAY AND COMPANY, LIMITED.

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TOMLIN J.
Feb. 12, 13, 16, 27.
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May 12, 13, 14, 26.

[1923. F. 2189.]

Trade Mark—Registration—To be used on Goods for export only—Distinctiveness—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 3, 9.

On an application to register three red lines or stripes as a trade mark for canvas hose, it was admitted that the mark had not been used in this country so as to become distinctive of the applicants' goods, but the evidence was that it had been used on goods of the applicants exported to foreign agents for sale abroad, and that the mark had become distinctive of the applicants' goods in the United States and Canada.

Evidence was given by the opponents to the registration that in this country coloured stripes had been used for many years upon hose to indicate the ownership and sometimes the quality of the hose as distinct from the source of origin. The number and colour of the stripes were determined by the owner who placed the order. Sometimes too, as in the case of the Admiralty, an owner obtained his supply from more than one source and would allocate to each source a different marking, so that he might know not only his own goods but also the quarter to which to make complaints if defects developed in the goods.

The applicants offered to submit to a condition not to use the mark, except on goods sent to the United States and Canada:—

Held, by the Court of Appeal (reversing the decision of Tomlin J.),

(1.) That the mark was adapted to distinguish, and did in fact distinguish, the applicants' goods from those of other makers, and that on the evidence its registration would not conflict with the trade of any other traders;

(2.) That although, in the opinion of the Court, the mark would otherwise have been registrable without any limitation as to place of user, the registration must, having regard to the offer made by the applicants, impose the limitation as to place of user contained in that offer.

MOTION.

The above named company applied for the registration in Part A of the Register of Trade Marks, class 50, of a mark consisting of three red lines or stripes in respect of canvas hose. The lines were to be woven into the hose throughout its length. The applicants had never used the mark otherwise than by attaching it to goods manufactured for export and sent to agents abroad for sale abroad, and they stated that they did not intend to use the mark in this country in any other way. They supported the application by putting in

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evidence that the mark had become distinctive of their hose in Canada and the United States.

The application was opposed by eight firms, who with the applicants were practically the only firms in this country manufacturing the hose in question. Each of the opponents gave a notice of opposition couched substantially in the same terms. The grounds of opposition there stated were as follows: "(1.) The registration of the trade mark would interfere with the use by us of a similar arrangement of parallel red stripes which we are lawfully using; (2.) The applicants' trade mark is common to the trade; (3.) The applicants' trade mark is not in fact distinctive."

At the hearing before the Registrar the applicants offered to confine the registration to export trade only.

The Registrar, however, refused the registration of the mark on the ground that it was not capable of distinguishing the applicants' goods, having regard to the user of one or more red lines in the trade for showing the ownership of the particular hose or for other purposes.

The applicants moved by way of appeal from this decision.

The effect of the evidence given on behalf of the applicants and respondents by affidavit and orally at the hearing sufficiently appears from the judgment.

The motion came on for hearing before Tomlin J. on February 12, 1925.

Sir Duncan Kerly K.C. and *Moritz* for the applicants. The mark which the Registrar has refused to register is a valid registrable trade mark within the definition in s. 3 of the Trade Marks Act, 1905, and s. 9, sub-s. 5. It is a "distinctive" mark, that is, "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons."

The evidence here establishes the use of stripes in connection with hose, either as part of the design or, as in the case of the user by the Admiralty, to indicate the source from which the particular hose came, or to indicate the ownership of the hose. There could not well be better evidence that stripes are adapted to distinguish, and no previous use of three red

lines has been suggested or deposed to. As further evidence that coloured stripes on hose are "adapted to distinguish," there is the registration of two blue lines with a red line between them granted in *In re F. Reddaway & Co.'s Application.* (1) The mark is admittedly not distinctive of the applicants' goods in this country. It is said that evidence of distinctiveness abroad is irrelevant for the purpose of this application. That would no doubt be so, if user of the mark was common here: *In re Gallaher's Application.* (2) But it must be relevant on the issue whether the mark is capable of distinguishing the applicants' goods to show that it does so in other countries. There is really no ground for refusing registration of the mark in this case.

Trevor Watson (*Hunter Gray K.C.* with him) for the opponents. The argument for the applicants has been on the lines that when once it is proved that a mark is adapted to distinguish, the right to registration follows. That is not so, for s. 9 of the Trade Marks Act, 1905, merely imposes certain limits of a negative nature; but where a mark has been shown to comply with the section, it is still for the Court to say whether in all the circumstances the mark ought to be registered. Further, in case of doubt, registration ought to be refused. Again, although there is now power under the Trade Marks Act, 1905, s. 12, sub-s. 2, as amended in Sch. II. of the Trade Marks Act, 1919, to register a trade mark subject to limitations as to "place of user" and therefore to grant a registration limited to use for export, yet there may be conditions in this country which preclude such a grant being made. The Court is principally concerned with the intended user in this country and the conditions in this country. It is true that the present applicants only claim to use this mark for export purposes, but the effect will be to prevent a trader here placing on his goods intended for export a mark which is distinctive of the applicants' goods in this country; and this will be so, although the goods are being exported to countries where the mark is not distinctive of the applicants' goods. This is a ground for refusing registration.

(1) [1914] 1 Ch. 856. (2) (1924) 41 Times L. R. 139.

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Again there are some kinds of marks which ought not to be registered. Thus the Court will not confer a monopoly in a combination of letters because, even though they have not so far been used by others, circumstances may arise in which a trader may legitimately desire to use them: *Registrar of Trade Marks* v. *W. & G. du Cros, Ld.* (1); *In re Eisman & Co.'s (London) Application* (2); *In re Garrett's Application.* (3) The evidence in this case shows that a rival trader may legitimately desire to put the mark sought to be registered on his goods to satisfy the requirements of a customer. It is not suggested that the possibility of such a user would in all cases be a ground for refusing registration; but in this particular trade there is an established practice of using stripes to show ownership or quality. In these circumstances the Court ought not to grant a monopoly of such a mark to a particular trader. It would be different if it was proved that three red stripes had by actual use in this country become distinctive of the applicants' goods. That is in fact the ground on which the application succeeded in *In re F. Reddaway & Co.'s Application.* (4) Further, this is a mark which admittedly depends for its distinctiveness on "colour" and "position." Usually a mark has a distinctive form, and it is often registered in all colours. A claim to register a mark depending on such limited matters for distinctiveness should be scrutinized closely.

To justify the registration of a mark, it must be shown to be distinctive in this country: *In re Gallaher's Application* (5); and it must be considered quite apart from the effect of the monopoly which registration creates: *Registrar of Trade Marks* v. *W. & G. du Cros, Ld.* (1) The question whether confusion is likely to arise by the use of a mark is tested, not by setting two marks side by side and considering whether they resemble each other so closely that they are likely to be confused, but by considering whether the recollection of

(1) [1913] A. C. 624, 634; 30 R. P. C. 660, 671.
(2) (1920) 37 R. P. C. 134.
(3) [1916] 1 Ch. 436.
(4) [1914] 1 Ch. 856.
(5) 41 Times L. R. 139.

the one is likely to be confused with that of the other. Here one, two and four red lines have been used by customers, and yet it is sought to obtain a monopoly for the use of three red lines. Such a mark is within the mischief of s. 11 of the Trade Marks Act, 1905, and ought not to be registered in view of the principles laid down by Lord Parker in *Registrar of Trade Marks* v. *W. & G. du Cros, Ld.* (1)

Evidence of distinctiveness abroad is of little value. The test is whether the mark is adapted to distinguish having regard to the circumstances of the trade in this country. In fact there is evidence that in America the practice of using stripes to show ownership does not exist. For all these reasons the Court ought to dismiss this application.

Dighton Pollock for the Registrar.

Sir Duncan Kerly K.C. in reply. The decision in *Registrar of Trade Marks* v. *W. & G. du Cros, Ld.* (2) is that when a symbol belongs to a class so small that other traders wanting to make use of a necessary description of themselves or their goods are likely to be unreasonably hampered by a restriction of that class, the Court will prima facie refuse registration of such a symbol on the ground that no member of that small class is adapted to distinguish : see also *In re British Thomson-Houston Co.'s Application.* (3)

There can be no legitimate ground for other traders wanting to use three red stripes that cannot be equally well served in some other way.

It is not denied that the Court has a discretion in regard to granting registration ; but it is not a ground for refusing registration that the effect of registration for export purposes will be to hamper British traders as compared with foreign traders. If it were, it would be a ground for refusing every registration for export purposes only. The applicants have offered to submit to the limitation that they shall not use the mark except on goods for export, and when so limited registration ought not to be refused.

Cur. adv. vult.

(1) [1913] A. C. 624, 634; 30 R. P. C. 660, 671.

(2) [1913] A. C. 624; 30 R. P. C. 660.

(3) (1917) 34 R. P. C. 169, 177.

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Feb. 27. TOMLIN J. delivered the following written judgment: This is a motion by F. Reddaway & Co., Ld., belting and hose manufacturers, by way of appeal from a refusal of the Registrar of Trade Marks on October 29, 1923, to proceed with the registration of a mark which the applicants seek to have registered under Part A of the Register in Class 50 in respect of hose for the transmission of fluids.

The mark in question consists of three red stripes or lines of a red colour substantially of the width and form as shown in the representation on the form of application, and extending throughout the whole length of the hose. It is intended for use in woven hose. It has in fact been used by the applicants for many years in connection with woven hose which they manufacture and mark in this country for exportation to Canada and the United States of America. The hose so marked has also in the past been exported to Germany. The applicants have never used and do not intend to use the mark in this country otherwise than by attaching it to goods manufactured for export and sent to agents abroad for sale abroad. Their reason for desiring registration here is to facilitate registration in other countries.

The mark is woven into the hose throughout its whole length and consists of three stripes, of which the centre stripe is formed by three interwoven strands of red colour, and each of the two outside stripes is formed by two such strands, the red stripes being separated from each other by two uncoloured strands.

The application was opposed by eight firms, who with the applicants are practically the only firms in this country manufacturing the hose in question. The applicants claim to rank as the manufacturers doing the largest business in this class of goods.

Each of the eight opposing firms gave a notice of opposition couched in identical terms mutatis mutandis. [His Lordship read the grounds of opposition.] I have little doubt that the opposition was originally launched upon the basis that stripes per se could not in this trade be distinctive at all, a view which cannot be maintained having regard to a former registration

to which I shall refer later. This position was not, however, sought to be supported either before the Registrar or before me, and the case was fought on the footing that in the circumstances of the trade it was difficult, if not impossible, to claim distinctiveness for stripes, unless that distinctiveness was supported by evidence of distinctiveness acquired by actual user in this country, and that, at any rate in the absence of such evidence, the particular mark could not be regarded as adapted to distinguish, and might well lead to confusion.

In support of this view the opponents by their evidence set out to establish, first that it is the common practice in the trade for customers to require a stripe or stripes to be woven into the hose to enable them either to identify their hose in circumstances which might, in the absence of identification marks, lead to confusion of ownership, or for other purposes, and that the stripes asked for and supplied vary in number and colour, and include red stripes either as a single stripe or as double or more stripes, and secondly, that, though stripes are also sometimes used by manufacturers themselves to identify particular qualities of the goods they manufacture, this is only done in conjunction with some other distinctive brand or mark, and, thirdly, that some of these stripe marks, whether used to distinguish ownership or quality, are such as might well be confused with the mark which the applicants seek to register.

Before dealing with the facts or with the principles applicable, I must note that in 1914 Warrington J. (as he then was) allowed the registration of another mark of the present applicants for the same class of goods consisting of two blue lines with a red one between them running through the whole length of the hose: see *In re F. Reddaway & Co.'s Application.* (1) That decision was reached upon evidence establishing that the applicants had for many years used the mark upon hose manufactured by them for the home market, and that in such market it had become identified with goods of their manufacture. Amongst those who gave evidence in support of the earlier application was Mr. John Martin,

(1) [1914] 1 Ch. 856.

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managing director for the William Rose Hose Co., Ld., one of the present opponents, and Mr. W. M. Angus, a director of Messrs. George Angus & Co., Ld., another of the present opponents. Each of these witnesses then stated that a distinctive coloured stripe or stripes woven throughout the entire length of the hose was the only really satisfactory means of identifying at sight hose of any particular manufacture, and that they identified hose marked with the mark then in question as manufactured exclusively by the present applicants.

It is admitted that the mark now in question is a device within s. 3 of the Trade Marks Act, 1905; nor is it contended that the intention of the applicants to use the mark by marking in this country the goods which they manufacture for export abroad in the manner already explained was not sufficient to make the mark one "used or proposed to be used" within the meaning of the same section.

The question is whether the mark is distinctive, that is, adapted to distinguish the goods of the proprietors of the trade mark from those of other persons within the meaning of s. 9, sub-s. 5, of the Act.

The principles upon which I must govern myself in determining this question seem to me to be these. I think first that "adapted to distinguish" means adapted to distinguish in this country having regard to the practices and conditions of the trade here; secondly, that though evidence of user in another country may be some evidence of an inherent quality of distinctiveness, it cannot be evidence that the mark is adapted to distinguish in the market of this country; and thirdly, that, in determining whether the mark is adapted to distinguish, it must be considered quite apart from the effect of the monopoly which registration creates: see Lord Parker's speech in *Registrar of Trade Marks* v. *W. & G. du Cros, Ld.* (1)

Now a mark may be adapted to distinguish either (1.) because by long user it has become associated with and known in the market as distinguishing the goods of a particular manufacturer, or (2.) because, not having been in fact

(1) [1913] A. C. 624, 634; 30 R. P. C. 660, 671.

used, it has characteristics calculated to make it noticeable and suitable for calling attention to the goods on which it is to be placed and for identifying the origin of the goods. It is obvious, however, that where the mark sought to be registered has not been used, and therefore falls within the second of the above cases, it is impossible to determine the question whether it is adapted to distinguish merely by an examination of the mark itself. It becomes necessary to ascertain the environment in which it is to be employed. For example, it may appear that the mark is one which is common to the trade, or it may appear that the environment is such that the mark, however great its inherent individuality, may suggest some idea not related to the idea of origin at all. In either of these cases its claim to be adapted to distinguish will fail. Into which case does the applicants' mark fall? I think it falls into the second case. The mark has never been used in the market of this country, and the evidence is that *here* it is not known as a trade mark. The fact that it has been used or has acquired distinctiveness in America and elsewhere is not, I think, relevant for this purpose. Treating the mark then as falling within the second case, the evidence of its user as a trade mark in America and elsewhere may have some relevancy on the point of the value of the mark for distinguishing goods by reason of inherent characteristic, but not otherwise. The most relevant evidence must be that by which the conditions obtaining in the home market are proved, and, until those conditions are ascertained, it will not be possible to predicate of it, whatever individuality it may inherently possess, whether in this country it is adapted to distinguish goods as a trade mark.

I find upon the evidence that in the home market for very many years lines of colour have been used upon woven hose to indicate the ownership of the hose as distinct from the source of origin of the hose, and for other like purposes, the number and colour of the lines being often determined by the owner when he makes his purchase. Sometimes where the owner obtains his supply from more than one source, he will allocate to each source a different marking, so that he knows

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not only his own goods but also the quarter in which to make complaint if defects develop in any of such goods. This is well illustrated by the practice of the Admiralty and some fire brigades. One, two and even more red lines similar to those proposed to be used in the mark in question have not infrequently been used and are being used in the manner which I have indicated, though no instance of three red lines has been given. Lines of other colours, and lines of more than one colour in combination, including red, have also been and are being so used.

The applicants' registered mark of a red line between two blue lines without any space between the lines was for many years before registration and is known in the trade as the applicants' mark. There is no other registered mark consisting of lines in use in the trade. One of the opponents, Messrs. George Angus & Co., Ld., has for many years used and is using certain coloured lines to distinguish quality in combination with a word such as "Saxon" or "Invincible" branded at intervals along the hose; but there does not appear to be any general user of lines as unregistered trade marks either alone or in conjunction with some other mark. The line devices so used by the last named company include one consisting of two red lines with a white line between them, the lines being of about the same width as the red lines in the mark sought to be registered, the word "Invincible" being also branded at intervals along the hose.

Having regard to the conditions obtaining in the market as I find them, and bearing in mind that I must disregard the effect of the monopoly which would be given by registration, I do not think that the mark in question is so adapted to distinguish the goods of the applicants as to justify its registration. It is of a character which will suggest to the minds of those familiar with the trade ownership rather than origin, the more so that its lines bear a close resemblance to, and might well be confused with, some ownership marks. The difference between two and three red lines is small, and is not in my opinion sufficient to eliminate the risk of confusion, and this being so I think there is a further objection in the

possibility of confusion with the two red lines separated by a white line used by Messrs. George Angus & Co., Ld.; neither the white line in that mark, differing as it does very little from the natural colour of the hose, nor the branding of the word "Invincible" at considerable intervals along the hose, affords in my opinion an adequate security against confusion.

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It follows from what I have said that in my opinion thé Registrar arrived at a right conclusion in holding that this mark was not one which ought to be registered, and if, judged in the light of the considerations which I have applied, it ought not to be registered, there can, I think, be no justification for registration, because the applicants are willing to submit to a condition not to use the mark except upon goods sent to agents abroad for sale abroad.

I think, therefore, that the motion fails and must be dismissed with the usual consequences in regard to costs.

H. C. G.

C. A. The applicants appealed. The appeal was heard on May 12, 13, 14, 1925.

Sir Duncan Kerly K.C. and *Moritz* for the appellants.

Trevor Watson and *G. W. Tookey* (*Hunter Gray K.C.* with them) for the respondents.

Sir Thomas Inskip S.-G. and *Dighton Pollock* for the Registrar.

The arguments on the appeal were substantially the same as in the Court below, and the following further cases were cited: *In re Crispin & Co.'s Application* (1) and *In re Bagots Hutton & Co.'s Application.* (2)

Cur. adv. vult.

May 26. POLLOCK M.R. This is an appeal from a judgment of Tomlin J. on February 27, 1925, whereby he confirmed the refusal of the Registrar of Trade Marks on October 29, 1923, to proceed with the registration of a mark (No. 420,023)

(1) [1917] 2 Ch. 267; 34 R. P. C. 349. (2) (1916) 33 R. P. C. 357.

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which Messrs. F. Reddaway & Co., Ld., seek to have registered under Part A of the Register in Class 50 in respect of canvas woven hose pipes for the transmission of fluids.

The mark consists in three parallel red lines woven into the hose throughout and parallel to its whole length, the lines being produced by coloured strands of which the hose is made. Two intervals of uncoloured strands passing along and in between the three coloured strands in effect make the collocation of the lines to be red, white, red, white, red. Admittedly the mark answers the definition of a trade mark within s. 3 of the Act of 1905, and there is evidence, fortified by actual user of similar methods, that the proposed forms the best system of marking hose, whatever be its purpose or signification: because such marks cannot be lost or overlooked even though the hose may be cut into small lengths. If single devices at intervals were adopted some length of the hose might chance not to carry the device upon it. There is evidence that the applicants for many years adopted such a device as their trade mark, for in the year 1914 Warrington L.J., then the judge of first instance before whom the present applicants applied to register as a trade mark lines of colour woven into the fabric and extending throughout the whole length of the canvas woven hose, stated in his judgment that the evidence then before him proved that for twenty years previously to the date of the hearing, Messrs. F. Reddaway & Co., Ld., had used a mark of three lines of colour—a red line between two blue lines—upon all the fire hose made by them, and for the purpose of distinguishing their hose from that of any other manufacturer. Warrington L.J. directed the Registrar to proceed with the application and the mark was registered. They still use that mark as their trade mark. There is thus evidence that for a length of time, not less than thirty years, a mark similar in device and character to that proposed has been used by the applicants as a trade mark: indeed their evidence carries the user much further back.

The opposition to the registration of the proposed mark is based upon the ground that such continuous lines of colour

along the hose have been used increasingly to denote proprietorship in the hose. For instance, it is proved that the Admiralty require the canvas woven hose that they buy to bear a blue line throughout its length, or a line of another colour, if they desire to identify the manufacturer from whom they have obtained it, and perhaps to fix responsibility in respect of it. Some makers use colour lines to denote the quality of the hose. So too there is proof of similar user of a coloured line to identify the hose of a particular fire brigade which enables them to limber up without any contest as to which line of hose belongs to a particular engine. It is argued that the result of these users is that it is not possible now to claim that stripes of colour are "adapted to distinguish," unless there is evidence that a particular mark has acquired that quality; and that in the case of a new and proposed mark for which such a characteristic cannot be claimed, there is not sufficient distinctiveness. To require the public to recognize one set of lines as a trade mark among many lines of colour used for various purposes would be unreasonable, for the many colour lines already used connote confusion rather than distinction. Now there is a danger of mixing two separate questions in this line of argument—namely, the method of marking and the actual mark to be adopted in the method of marking. The method of marking by weaving colour lines into canvas hose is, from the practice I have already recounted, clearly adopted as a practical and useful system whatever be its signification. For this reason the cases, such as the application of W. & G. du Cros for registration of the letters W. & G. (1) and the application of Eisman & Co. to register "Eanco" (2), ought not to govern our decision upon the present application. We have to consider it upon the basis of the essential particulars required by s. 9 of the Act of 1905 for registrable trade marks. Thus we must consider whether this significant mark is "adapted to distinguish the goods of the proprietor of the trade mark from those of other persons" so as to entitle it to be deemed "distinctive." The applicants prove, and their evidence is

(1) [1913] A. C. 624; 30 R. P. C. 660. (2) 37 R. P. C. 134.

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corroborated, that the proposed three red lines is a very old mark, used by them for many years specially for the markets of the United States of America and Canada. One of the opponents, who use a line, and a word, to mark their hose, admitted in his evidence that a person who saw their line, but not their word, on a piece of hose, would recognize it to be of their manufacture. Another of the opponents, Mr. Martin, declared that the evidence which he gave when he supported the application of the present applicants before Warrington J., in which he affirmed that he identified hose marked with red and blue lines as Reddaways', was true then, and is true now; that he had never known any one else use the mark for which Reddaways are now applying, but he adjudged it not to be distinctive because it was "similar to many other red stripes." This is a criticism which could be levelled against many other "distinctive marks," but, unless it establishes that the mark proposed is calculated to deceive, ought not, in my judgment, to be deemed fatal to it. It is impossible to disregard the weight of the above and other evidence in the case. I agree with the reasoning which led Lawrence J. to allow the appeal in *In re Diamond T. Motor Car Co.'s Application* (1), and see the decision of the House of Lords in *Bagots Hutton & Co.'s* case. (2)

The opponents endeavour to dismiss the effect of the previous registration allowed by saying that Warrington J. allowed the red and blue lines to be registered because it was proved that such a mark had acquired distinctiveness, whereas no such proof can be given in respect of the proposed three red lines. There is a fallacy in any such proposed contrast. The method of marking by the lines of colour used was proved before Warrington J. to have acquired distinctiveness: but if the application of this method had been by their user of three green or three violet lines, the same result would have followed. That result was not due to the particular colours, but to the method carried into effect by the lines of colour selected. Once the method is accepted as indicative of distinction, variance can be effected

(1) (1921) 38 R. P. C. 373. (2) 33 R. P. C. 357.

to any extent by alteration of the colours used, save that those chosen must not be calculated to deceive. Lord Haldane in *In re Bagots Hutton & Co.'s Application* (1) adopted the observation of Lord Selborne, that the Registrar ought not to refuse to register a mark as calculated to deceive where there is no evidence, intrinsic or extrinsic, of a design to pass off goods as those of another man's, where the marks are distinct, and where registration would be permitted, but for the mere possibility of confusion by inexperienced people. I cannot accept the suggestion that nowadays stripe marking on fire hose does not indicate anything to any person. Those marks may have different significations: but one of them is to indicate the origin of the goods, for they do so in the case of Reddaways' goods. Messrs. Angus use their stripe marks to indicate quality, and their purpose in doing so is recognized as effective.

I think the Court is entitled and ought to look at all the circumstances of the case, the evidence as to user in markets at home and abroad, for I cannot agree with the learned judge that in the first instance distinctiveness in the home market alone is to be considered. Tomlin J. accepts the proposition that evidence of user in another country may be some evidence of an inherent quality of distinctiveness, but holds that the user in another country cannot be evidence that the mark is adapted to distinguish in the market of this country. I repeat that in my judgment the Court must look at all the circumstances, and I cannot separate the market at home so completely from markets abroad. The commodity on which the mark is to be put is of special rather than general use, and the markets at home and in foreign countries must react and inter-act on each other. Those who trade in the goods will, without difficulty, become familiar with the trade marks registered in any of them.

Upon these considerations I have come to the conclusion that the proposed three red lines are adapted to distinguish Reddaways' goods, and as there is not sufficient evidence that the mark is calculated to deceive, I think the Registrar

(1) 33 R. P. C. 371.

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must be directed to proceed with the registration. The opinion I have expressed does not intrinsically require any limitation as to place of user: but as the application proceeded on the basis of the user being confined to the United States of America and Canada, and a different position might have arisen if that offer had not been made, the right course is to order that the registration must impose the limitation as to place of user that has been offered.

The appeal will be allowed with costs.

WARRINGTON L.J. This is an appeal from an order of Tomlin J. confirming the refusal by the Registrar to proceed with an application of the appellants for the registration of a trade mark.

The appellants, F. Reddaway & Co., Ld., of Manchester, are manufacturers of woven canvas hose for use in connection with fire-engines and for similar purposes. They seek to register their mark in Class 50 in respect of such hose. The mark consists of three parallel red stripes running through the entire length of the hose, and they desire that registration should be so limited. The question is whether the mark proposed to be registered is adapted to distinguish the goods of the appellants from those of other persons. The mark has been used in this country for about forty-five years in the sense that the goods with the mark woven therein are made here. These goods, however, have not been sold in this country, but have been exported to Canada, the United States of America, and, for some time before the war, to Germany. The mark has been used for no other purpose than to distinguish the appellants' goods from those of other persons, and there is evidence that in the United States of America it has come to be recognized as having that effect. The same appears to be the case in Canada where, since the present application was made, it has been registered as a trade mark. The fact is that for the period mentioned above the mark has been used as the trade mark of the appellants for their export trade and in no other capacity.

It is not immaterial that for the home trade the appellants

are the registered owners of a trade mark consisting of three colour stripes, blue, red and blue, woven throughout the whole length of the hose. This trade mark was registered as the result of a decision of the Court in *In re F. Reddaway & Co.'s Application* (1), and has been used by the appellants ever since. Another fact to be borne in mind is that the trade in question is of a limited nature both as regards those who engage in it and as regards the users of the goods. There are only eight manufacturers of the articles dealt in besides the appellants, and having regard to the nature of the goods those who buy and use them must be limited in number. Throughout the period of forty-five years no other manufacturer has for any purpose used three parallel red stripes woven in the fabric throughout the length of the hose. As to the recognition in Canada and the United States of America of the distinctiveness of the mark, it seems to me that where the market for the goods bearing a mark is exclusively an export market, the acceptance in that market of the mark as distinctive must be relevant to the question whether for the purposes of the legislation in the country of origin the mark is adapted to distinguish the goods of the user thereof from those of other persons.

On the facts above stated I am of opinion that prima facie the mark in question ought to be accepted as adapted to distinguish the goods of the appellants from those of other manufacturers. The question then arises whether the opponents have proved any facts which displace the prima facie conclusion. What the opponents say in effect is this: that they have proved that other manufacturers have used marks consisting of one, two or more stripes of colour woven throughout the length of the hose for the purpose, in some cases, of indicating a particular quality of goods and thus distinguishing the goods so marked from goods of a different quality made by the same manufacturer, and in others of identifying, at the request of the purchaser, the hose belonging to him. In these last cases, of course, the mark is that of

(1) [1914] 1 Ch. 856; 31 R. P. C. 147.

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the particular purchaser and not of the maker; just as if a purchaser of, say, silver plate requests the maker to have his crest or initials engraved upon it. The opponents then say that having regard to the user of stripe marks above mentioned, persons engaged in the trade would not know whether the mark in question was meant to distinguish the appellants' goods or was only used for one or other of the two purposes above mentioned. With all respect to those who put forward this contention I can only say that I do not believe that any one reasonably familiar with the ways of this trade, limited as it is, both as regards the makers and the users of the goods, would be deceived for a moment as to the purpose for which Messrs. Reddaway use the mark in question. It is not suggested that at any time during the long period of user Messrs. Reddaway have made hose of more than one quality or used the mark in question upon goods of a particular quality only. To suggest that it has ever been used by them as a purchaser's identification mark would be manifestly absurd, nor can I believe that any one with a knowledge of the ways of the trade could ever suppose that this was the case.

I have not thought it necessary to examine in detail the evidence of the user relied upon by the opponents. Even if it proves to the full what, as stated above, I understand their case to be, it does not in my opinion displace the conclusion at which I should arrive on the other facts of the case. In my opinion the mark in question has for forty-five years been used by the appellants as their trade mark in the export trade, and it is adapted to distinguish and does in fact distinguish their goods from those of other makers. I think in strictness the appellants are entitled to registration without local restriction as to user, but they have offered to submit to a restriction limiting the user of the mark to goods exported to the United States of America and they should, in my opinion, be held to that offer.

In the result the appeal ought, in my opinion, to be allowed and an order made that the Registrar proceed with the

application. The terms of the proposed restriction will be settled by the Registrar. The appellants are entitled to their costs here and below.

SARGANT L.J. The trade mark which the applicants seek to register is one in respect of hose for the transmission of liquids, such as ordinary fire hose, and consists of three parallel stripes of red woven into the hose throughout its entire length. It is intended to be limited to goods made here for export to the United States of America, where it has for many years past been officially recognized as denoting those of the applicants' make; and the object of the registration is to meet the objection to the registration of the trade mark in the United States, which arises from its not being recognized at present in the country of origin of the goods.

The registration was opposed by eight firms who are practically the only firms in this country making hose of the kind in competition with the applicants, and whose combined output is said to be about equal to that of the applicants; and their objection to the registration is substantially that the mark is not "distinctive" within the meaning of the Trade Marks Act, 1905, i.e., is not adapted to distinguish the goods of the proprietor of the trade mark from those of other persons. The Registrar of Trade Marks and Tomlin J. have accepted this view, and have refused registration. The appeal to this Court is brought against this refusal.

That a set of parallel coloured stripes woven into the fabric of such hose may be a good and distinctive trade mark has already been decided in the year 1914 (1) by Warrington J. on an application by the present applicants to register a trade mark consisting of two parallel blue lines outside a central red line. This decision has not been questioned in any way by the present opponents; and is, in my judgment, obviously correct. It is true that in that case there was positive evidence that the mark in question had been used for many years in the home market, and had become identified there

(1) [1914] 1 Ch. 856; 31 R. P. C. 147.

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with the hose made by the applicants. But none the less the decision establishes the general suitability or adaptability of parallel coloured stripes woven into hose to distinguish the hose of a particular manufacturer. Indeed on that occasion evidence was given by directors of two of the present opponents, who were then supporting the application, that coloured stripes woven into that hose were the only satisfactory means of identifying the hose of particular makers. On the cross-examination in the present proceedings of representatives of these two opponents the same fact was elicited. And it further appeared in the course of this cross-examination that one of these opponents, Messrs. Angus, had for some time past identified hose of their manufacture by means of one or two coloured red stripes woven through its entire length, though there is also a subsidiary use of the one stripe mark or the two stripe mark as distinguishing a first or second grade of their hose.

It has also been established that for forty years or more the applicants have used the three red stripes now sought to be registered on hose exported to Canada, and to the United States of America; that this mark has now been registered in Canada, and that it is fully recognized in the United States as denoting hose made by the applicants. And apparently the only reason why the applicants cannot obtain the actual registration of the mark in the United States is that it is not registered here. Further it is to be noted that the goods in question are obviously saleable only in considerable lengths and to purchasers of some degree of experience and knowledge.

The foregoing facts, in my judgment, constitute a very strong prima facie case to show that the three red stripes in question are adapted to distinguish the hose of the applicants intended for export to the United States of America from the hose of other makers. And I am unable to adopt the very marked distinction drawn by the learned judge between marks that have already become associated with the goods of a particular maker of actual user in the home market on the one hand, and marks which have either

been used only in foreign markets or which are actually new marks on the other hand. In every case I think that the applicant has to establish the same proposition—namely, that the mark is adapted to distinguish; and actual user is treated by the concluding paragraph of s. 9 of the Act of 1905 merely as one admissible item of evidence (though of course an item which may be of great importance) to establish this inherent suitability. It seems to me that evidence that in actual user the three red stripes have in the case of hose exported to the United States long since become distinctive of the applicants' goods is substantially as valuable to show the three stripes are adapted to distinguish these goods, as the similar evidence on the previous application was to show that the blue-red-blue lines were adapted to distinguish the applicants' hose in the home market.

As against this strong prima facie case the objections of the opponents seem to me to be of comparatively slight importance. We have been supplied with diagrammatic representations of all the various line markings which have been mentioned in the evidence, and to my eye there is a marked distinction between the mark now in question and every one of these other markings. By far the nearest is that of the two red lines separated by a white line which is used by Messrs. Angus & Co., one of the opposing firms. Not only, however, is the three red line mark sufficiently different to my eye from this mark to prevent confusion, but no case of the probability of such confusion has been made in the evidence for the opponents. And further in the market of the United States of America, the market to which the applicants' mark is intended to be confined, any probability of confusion appears to be negatived by the recognition there of the mark now in question as denoting the applicants' make.

Further, the opponents have shown that as regards the other marks represented on the diagrammatic table, there has for many years past been a use which is described by the learned judge as follows: "I find upon the evidence that in the home market for very many years lines of colour

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have been used upon woven hose to indicate the ownership of the hose as distinct from the source of origin of the hose, and for other like purposes, the number and colour of the lines being often determined by the owner when he makes his purchase. Sometimes where the owner obtains his supply from more than one source, he will allocate to each source a different marking, so that he knows not only his own goods but also the quarter in which to make complaint, if defects develop in any of such goods." And such a use appears to have been even more common in orders for abroad than in orders for the home market, though I doubt whether it can be described at the most as more than occasional and sporadic. But, in my judgment, use for such a purpose is not use as a trade mark at all, and can have little, if any, operation as between vendors and purchasers. And I cannot think that, even if the home market, and not the American market, had to be considered, such in practice would tend to prevent hose offered for sale, with the mark now in question incorporated in it, being recognized as the hose of the owners of the mark. Still less could such a practice have the effect of rendering such a mark common to the trade. Indeed the tendency of this evidence seems to me, on the whole, rather in favour of the applicants than of the opponents. For it indicates that such marks are adapted to distinguish, though the purpose for which they are used to distinguish is not an ordinary trade mark purpose but one connected with the convenience of the purchaser in actual use.

In my judgment the mark is adapted to distinguish in itself, it has acquired distinctiveness in the market for the purposes of which it is sought to be registered, its registration would not conflict with the trade of any other trader, and indeed it could not at the present time be honestly used by any maker here on goods which were being manufactured to be dealt in on or for the market of the United States of America. And registration in colour being now permissible, and also registration with a local or geographical limit, the present case is one in which the application should be acceded to.

At the close of his argument Sir Duncan Kerly suggested that registration of the mark should be permitted generally and without limitation to the United States. But such a limitation was accepted by the applicants before the Registrar and for the purposes of the appeal to Tomlin J., and it was to an application with this limitation that the evidence and the arguments of the opponents were directed before both these tribunals.

In these circumstances it would be unfair to the opponents that the applicants should at this stage be allowed to extend the range of their application. I agree that the appeal should be allowed, but without any such extension of the scope of the application.

Appeal allowed.

Solicitors: *W. J. & E. H. Tremellen, for Blair & Seddon, Manchester; Bristows, Cooke & Carpmael; Solicitor to Board of Trade.*

R. M.

HAHN *v.* PUBLIC TRUSTEE.

[1923. H. 3093.]

Alien Enemy—German National—Loss of Nationality—Onus of Proof—Certificate of local German Government—Weight—Validity—Treaty of Peace Order, 1919, *s. I., sub-s. xvi.*

In 1893 the plaintiffs were admittedly German nationals, and on the bona fide assumption that they were still German nationals on January 10, 1920, when the charge under the Treaty of Peace Order, 1919, s. I., sub-s. xvi., attached, the defendant was in possession of their London property as custodian.

In an action to obtain release of their property:—

Held, that the onus was on the plaintiffs to show that they had lost their original German nationality before January 10, 1920, and not on the defendant to disprove it.

The plaintiffs had left their birthplace, Idar, in the district of Birkenfeld, about 1893, and with the exception of short annual visits to their mother, and, in the case of one, six weeks military training in 1896, they had resided uninterruptedly out of Germany from 1893 to 1917 or 1918, when they were repatriated, after war internment, to Idar, where according to the police register entries, if genuine, they were registered

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as Stateless on their arrival, and also on their departure for Amsterdam in 1920.

On January 29, 1923, the Birkenfeld Government, after inquiry as to the period of the plaintiffs' absence from Germany, and as to their German visits during that period, granted them certificates to the effect that during that period they had forfeited their German nationality by ten years "uninterrupted" residence abroad within the meaning of s. 21 of the North German Nationality Law, 1870, and were therefore Stateless on January 10, 1920.

These certificates were based on the view of the Administrative Courts which, in considering whether German visits break the ten years period, look to the number, length, purpose and intent of those visits.

They were however directly contrary to the view of the Leipzig Reichsgericht, which holds that the smallest visit, accidental or otherwise, breaks the period.

Held, that the certificates, which were admittedly only prima facie evidence and open to review in any German Court, were not conclusive in an English Court, and the onus was on the plaintiffs to substantiate them.

Held, also, that if the Leipzig Court view was right, the certificates were invalid.

Held, also, that, even if the Administrative Court view was right, the plaintiffs had failed to satisfy the English Court that an Administrative Court on being informed of all the circumstances, including fraudulent conduct by the plaintiffs, applications as German nationals in 1915 and 1921, and previous false statements as to their German visits, would necessarily uphold the certificates.

Held, finally, that, having regard to the conflict of opinion in the German Courts, the plaintiffs had failed to discharge the onus of proving that by unquestionable and undoubted German law they had lost their nationality on January 10, 1920.

WITNESS ACTION.

The plaintiffs were three brothers born at Idar in the district of Birkenfeld in the State (formerly Grand Duchy) of Oldenburg in Germany. Rudolph was born on July 8, 1863, Eugen on August 16, 1868, and Paul on August 18, 1870. They resided at Idar until 1892 or 1893. They were unmarried.

Rudolph, who had been an officer in the German army, served one year from April 1, 1886, eight weeks in 1888, two periods of six weeks before 1893, and one period of six weeks in 1896. He came to London in 1893 and resided there till 1895. He then resided at Paris till 1914, when he returned to London. On June 22, 1915, he was interned. In March, 1918, he was released and repatriated. He had not at any time registered himself as a German at the German Consulate

in London or Paris or obtained a passport (Reisepapier) or a certificate of origin (Heimathsschein), and on his return to Idar on March 19, 1918, he was alleged to have been registered by the police authorities as Stateless. Apart from his military training in 1896 his only visits to Germany from 1893 to 1914 had been frequent Christmas visits to his mother at Idar.

Eugen had served in the German army as a private for one year from October 1, 1888, and sixteen weeks in 1890. He came to London in 1893 and resided there. On March 7, 1915, he was interned. He was released and repatriated in March, 1918. He had not registered himself at a German Consulate or obtained a passport or certificate of origin, and on his return to Idar on March 19, 1918, he was alleged to have been registered by the police authorities as Stateless. His only visits to Germany were short visits twice a year to see his mother.

Paul, who was never in the German army, came to London in the latter part of 1892 and resided there. On July 30, 1915, he was interned. In January or February, 1917, he was released and repatriated. He had not registered at a German Consulate or obtained a passport or certificate of origin, and on his return to Idar on February 3, 1917, he was alleged to have been registered by the police authorities as Stateless. He had only visited Germany once a year for a week to see his mother.

In 1920 the plaintiffs settled in Amsterdam and were still there.

Before and at the outbreak of the war the plaintiffs were carrying on business in London under the style of Rudolph Hahn & Sons, and during the war, by order of the Board of Trade, in pursuance of the Trading with the Enemy Amendment Act, 1916 (5 & 6 Geo. 5, c. 105), this business was wound up, and the moneys realized were vested in the Public Trustee, the defendant. During the course of the winding up it was discovered that the plaintiffs had been systematically defrauding the Inland Revenue by false income tax returns, and triple tax and fines amounting to 60,000*l.* had to be

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paid out of their property, leaving about 170,000*l.* now in the defendant's hands. On July 8, 1919, their late manager was convicted of conspiracy with the plaintiffs in this respect and sentenced to three months imprisonment in the second division, and the Common Serjeant regretted that the partners were not before him: see Times, July 9, 1919, p. 9c.

On January 25, 1923, the plaintiffs applied to the defendant for the release of their property on the ground that before January 10, 1920, when the charge under the Treaty of Peace Order, 1919, s. I., sub-s. xvi., attached, they had lost their German nationality by ten years uninterrupted residence abroad within the meaning of s. 21 of the North German Nationality Law, 1870. They subsequently submitted evidence, including certificates of January 29, 1923, from the Government of Birkenfeld to this effect.

On August 28, 1923, this request not having been complied with, the plaintiffs brought this action for a declaration that on January 10, 1920, and after, they were not German nationals and their property was not subject to the charge.

Owing to their liability to arrest for defrauding the revenue the plaintiffs were unable to give evidence in person. Evidence of other people, both on commission and here, was given as to the plaintiffs' movements, as to the validity and weight of the Birkenfeld certificates, and generally on the question whether the ten years residence abroad is broken by a short interruption. This evidence and the various documents produced are fully stated in the judgment.

Sir Walter Schwabe K.C., *Wilfrid Greene K.C.* and *August Cohn* for the plaintiffs. The defendant is in possession of the plaintiffs' property. The onus is on him to justify that possession by showing that they were German nationals on January 10, 1920. That onus is not discharged by proof or admission that they were German nationals in 1893.

Suppose, however, that the fact of their German nationality in 1893 shifts the onus of proof. The plaintiffs produce certificates from the Government of Birkenfeld, the duly constituted authority, that they have forfeited their

nationality by ten years uninterrupted residence abroad. These certificates, granted by President Dorr after full inquiry, are prima facie evidence of that fact, and the onus is on the defendant to displace them. He could no doubt attack them for fraud, or want of jurisdiction. But he cannot say they are wrong in German law, and at all events the onus is on him to prove it.

Now the question how far short visits are an interruption of the ten years period is undoubtedly a moot point in German law. The Leipzig Court holds that the shortest visit for any purpose whatever is an interruption, and the Economic Court, a sort of compensation tribunal, applies this view in practice, though it has given no actual judgment thereon. The administrative authorities apply the same view in practice in obedience to Administrative Ordinances to that effect, but of course that does not affect the German law.

The Administrative Courts on the other hand take a more reasonable view and look to the number, length, purpose, and intent of the visits. These certificates were no doubt granted on the Administrative Court view, but this Court cannot say that they were therefore wrong in German law.

In *Reeve* v. *Loyauté* (1) your Lordship followed Dr. Schuster's uncontradicted evidence that the Administrative Court view was correct, and the same view has since been adopted by the Hamburg Administrative Court in 1924 in *Schroeder's* case. Statelessness is now recognized in England: *Stoeck* v. *Public Trustee.* (2)

Sir Douglas Hogg A.-G., *Gavin Simonds K.C.* and *Stamp* for the defendant. The plaintiffs were originally German nationals, and the onus is on them to show that they lost that nationality under the 1870 Act, s. 21, by ten years uninterrupted residence abroad. That requires proof of the actual German law. But on this point the German law itself is doubtful. Is the ten years period broken by any visit whatever, which is the Leipzig view, or only by a visit with intent to break it, which is the Administrative Court view? If the former, cadit quaestio. The period was

(1) July 14, 1922. Unreported. (2) [1921] 2 Ch. 67.

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actually broken. If the latter, the plaintiffs have given no evidence of intention either way. In either case therefore the defendant must succeed.

Now look at the facts. In their applications for exemption from internment in 1915 the plaintiffs stated their nationality as German. They repeated this statement in 1921 when their firm made a claim against the Public Trustee through the German Clearing Office. In their applications and statutory declarations to the Public Trustee in support of their present claim in February, 1923, they made wholly false statements as to their German visits, and Rudolph and Eugen denied any military service. Their solicitors' subsequent letter of January 15, 1924, is no successful palliation of these falsehoods. The entries in the Idar Police Register are open to grave suspicion. It is almost incredible that the plaintiffs were actually registered as Stateless on their arrival in 1917 and 1918. The probability, assuming that the register has not been tampered with, is that it has been written up to date by some official. The commercial register shows that the plaintiffs were carrying on business in Idar, after purporting to leave there for good.

As to the Birkenfeld certificates. It is doubtful whether there is any power to issue certificates of statelessness. At all events President Dorr as an executive officer ought to have applied the Leipzig decision, which, in view of the conflicting decisions, all executive authorities were by Executive Ordinances directed to follow. He had no right to give his own view of the law. In any case the certificates are only prima facie evidence and are open to review in any German Court, both on the law and the facts. In the face of the facts proved they would practically be treated as waste paper in any German Court, and the English Court cannot possibly be bound by them.

Sir Walter Schwabe K.C. in reply. The Dorr certificates would no doubt be open to review in any German Court, but unless and until so reviewed and displaced they are binding. How can this Court review them on a question of German law? The plaintiffs no doubt in 1915 and 1921 stated their nationality as German. But the real question is not whether

the plaintiffs have sometimes wilfully or carelessly misdescribed their nationality, but what in German law that nationality actually was on January 10, 1920. The fact that they registered and retained their business connection at Idar is almost whimsical evidence that they intended to retain their original German nationality.

The defendant says that the plaintiffs have not proved their intention not to remain German. But they have proved the purpose of their visits. They do not have to prove a negative, i.e., that their visits were not intended to break the ten years period. That was a matter for President Dorr. If the certificates had been refused the plaintiffs would have appealed to the Administrative Court which, on being satisfied as to the purpose of these short visits, would clearly have followed the Administrative Court decisions. The suggestion that the police register may have been tampered with ought never to have been made.

ASTBURY J. [after stating the facts:] The question I have to decide depends upon German law. Sect. 21 of the North German Nationality Law, 1870 (subsequently extended to the whole of the German empire), provides that "North Germans who leave the territory of the Confederation and stay uninterruptedly for ten years abroad thereby forfeit their State subjectship or political nationality. The aforementioned period of time is counted from the moment of leaving the territory of the Confederation, or if the person leaving is in possession of a passport [Reisepapier] or a certificate of origin [Heimathsschein], from the moment of the expiration of those papers. That period of time is interrupted by inscription on the Register of a Consulate of the Confederation." It is not suggested that any of these three plaintiffs obtained a passport or certificate of origin, or that they inscribed their names on the register of any German Consulate, and the question whether they were or were not of German nationality on January 10, 1920, depends upon whether they had, before that date, within the true meaning of this statute, stayed uninterruptedly for ten years abroad.

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On July 22, 1913, an Imperial Statute was passed in Germany which as from January 1, 1914, impliedly repealed the provision that a German should lose his nationality by staying uninterruptedly abroad for ten years. The repeal is not retrospective. Sect. 39 provides that "The Federal Council issues regulations respecting certificates of admission to nationality, naturalisation, and discharge, and documents which serve to prove nationality. The central authorities of the Federal States determine what authorities are to be considered in the sense of this law as superior administrative authorities and military authorities." The word "discharge" in that section is explained or referred to in s. 17, whereby it is stated that nationality is lost (1.) by discharge; (2.) by the acquisition of a foreign nationality; (3.) by non-fulfilment of military service; (4.) by the decision of the authorities; and in two other cases not relevant hereto. Regulations were issued under s. 39 as to the proper authorities in Germany to issue the certificates therein referred to, and evidence has been given that the Government of Birkenfeld was the proper authority to give such certificates for the district in which Idar is situated.

The exact question before me is whether the plaintiffs have satisfied this Court that all or any of them lost his German nationality before January 10, 1920. In my judgment the onus is on the plaintiffs to prove this and not on the defendant to disprove it. This question depends upon German law, which in this Court is a question of fact, and in my opinion the plaintiffs must satisfy the Court as to what the German law on the point at issue is, and not what it may be or ought to be.

In *Reeve* v. *Loyauté* (1) I decided a somewhat similar question, and as the plaintiffs rely upon my judgment in that case I will shortly explain it. In that case, in which the facts have little relation to those in the present case, a lady petitioned for the payment out of Court of a sum of 5000*l.* to which she became entitled under the will of one Esther Torrens. The petitioner was the daughter of a

(1) July 14, 1922. Unreported.

German father and a French mother. She was married at Leipzig in 1889 to a German, upon which she retained her German nationality. In or about 1902 she left her husband and Germany and returned with a daughter to France, with the intention of permanently living in that country, and she lived uninterruptedly in Paris from 1902 until 1914, and never set foot upon German soil except on two occasions, which were in connection with divorce proceedings brought against her by her German husband for desertion. Her two visits to Germany were made by day to Cologne to consult a lawyer in these divorce proceedings, she returning on each occasion to Paris the same day. In that case the custodian was, as in this case, the defendant or respondent, but the only evidence adduced was an affidavit by the late Dr. Schuster in support of the petitioner's claim. Dr. Schuster, after giving his view of the German law, mentioned that there was an isolated decision of one of the Criminal Divisions of the German Imperial Court at Leipzig in 1895, to the effect that the ten years' residence abroad, involving loss of German nationality under the Act of 1870, was interrupted by the shortest visit of the person in question to Germany. Dr. Schuster stated that that case was not reported, and that it appeared to him to have been generally unknown until it was expressly referred to and dissented from in a judgment of the Supreme Administrative Court in Prussia in 1902. Now I do not propose to go through what I said in that case. I had the uncontradicted evidence of Dr. Schuster before me. He stated in substance that the Supreme Administrative Court of Prussia had in its judgment directly dissented from the Leipzig decision, which he appears to have thought was an isolated case, and he explained that the Prussian Court construed the words "ten years uninterrupted stay abroad" as similar to, though not necessarily the equivalent of "domicil," and went consequently into the matter of intention of the person in question. If that were the true construction of the expression in this statute it seemed to me then, and it seems so still, that the decision of the Prussian Court based upon that view was only common

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sense, although it is quite irrelevant whether I think so or not. Dr. Schuster then went into various other matters, and finally stated that in his considered opinion as a German lawyer, if that matter were then to be brought before a German Court on the facts of that particular case, the Court would, on those facts, hold that the petitioner had ceased to be a German national in or about 1912. That was the only evidence before me. The Public Trustee put in no evidence to the contrary, and the question being one of fact, I had no alternative but to act upon Dr. Schuster's evidence as to what, in his view, was the German law on the subject.

In the present case it appears that the position in Germany is entirely different from that which Dr. Schuster supposed. He thought there had only been one isolated decision at Leipzig, which had been consistently departed from since it was given. I have now had the assistance of three expert German lawyers, two called by the plaintiffs and one by the defendant, and I have been made acquainted with the state of the decisions in Germany and the opinions of its legal jurists to a very much greater and different extent than in *Reeve* v. *Loyauté*. (1)

These German decisions are as follows: The Imperial Court of Leipzig, which is the highest Court in Germany, and which has both a civil and a criminal side, held on February 4, 1895, that the ten years term in the Act of 1870 was interrupted by any physical entry of the person in question into Germany, and that as from such entry the ten years term had to commence again. The Leipzig Court has consistently followed its own decision in a considerable number of cases since February, 1895. There is one in November of that year, another in November, 1897, another later in the same month, one in June, 1904, and another in 1906; and both of the plaintiffs' experts have told me that the Imperial Court of Leipzig has consistently followed the view expressed by it in February, 1895, and has never departed from the reasoning and effect of that decision, and from this Court at Leipzig there is no appeal.

(1) July 14, 1922. Unreported.

The second set of Courts referred to are the Supreme Administrative Courts of the various German States. In *Reeve* v. *Loyauté* (1) Dr. Schuster referred to decisions of these Courts as refusing to follow the Leipzig ruling, and I have been referred to decisions of the Supreme Administrative Courts in Prussia, Bavaria and Hamburg. The first considered decision of these Courts was a decision of the Prussian Court of June 25, 1901. That was followed in 1904 by a somewhat similar decision of the Bavarian Administrative Court; again in the same Court in 1908; and as late as January, 1924, there was a similar decision of the Administrative Court of Hamburg. Now in the Prussian decision the question involved was as to the nationality of a German-born subject who had gone abroad to Holland and had become naturalized there. He gave evidence as to certain visits that he had paid from time to time to Germany, and the Court held that each case must be considered in accordance with its particular circumstances. This was an appeal from a decision of an administrative body, and the appellant's evidence not being contested by the respondent the Court held that this naturalized Hollander had not, by casual visits to Germany, interrupted the ten years term. That, in the reasoning of the Court, was quite contrary to the Leipzig decision, but so it was. From the Administrative Courts again there is no right of appeal. The Bavarian Courts in the decisions that I have mentioned, especially in the second one, where the facts are better known, held that yearly visits to Germany for several days by a person whose residence was permanently abroad, to visit his brother and sister, did not entitle the Court to assume that the man paying such visits intended to keep up his political relationship with Bavaria, and they again held, contrary to the Leipzig view, that those visits did not interrupt the ten years term. In the Hamburg case in 1924, which was an appeal to the Administrative Court of Hamburg from the police authorities of that city, on the question whether the appellant had or had not lost his German nationality, the Court gave a reasoned and

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considered judgment to the same effect as the decisions of the Prussian and Bavarian Courts.

There is a third Court in Germany from which again there is no appeal, and which is, if one may use the term under the Republic, a Reichs or Imperial Court, which has been referred to in this case as the Economic Court or the Compensation Court. This was a Court set up to determine questions of compensation between individuals and the Reich on the very question that is now before me. There is a slight dispute as to the effect of what the Economic Court has done. I do not think the dispute really amounts to anything, because on reading the three decisions of that Court which have been referred to by the defendant it is perfectly plain that it has based itself upon the Leipzig view and not upon the view of the Administrative Courts. It is quite true that there is no direct decision of the Economic Court definitely deciding the exact meaning of the ten years uninterrupted stay abroad in the statute of 1870, but I personally have no doubt, nor have the plaintiffs' expert witnesses from those decisions, that that Court has acted in accordance with the view laid down by the Imperial Court at Leipzig, and has never attempted to follow or suggested that it ought to follow the view of the Administrative Courts.

The plaintiffs' first witness, Dr. Baerwald, said: "The Imperial Economic Court is constituted to deal with questions under the Treaty, i.e., compensation. It has given decisions as to nationality and loss of nationality and it has followed the Leipzig decision in a number of cases."

The three decisions of this Economic Court which have been referred to are decisions in the cases of Fritz, Weiss, and Hartmann. I do not think it necessary to refer to them in detail. They are consistent with the view that the Court adopts the Leipzig ratio decidendi, they are inconsistent with the view that it has in any way followed the Administrative Court decisions, and the opinion of the plaintiffs' leading expert is that this Court bases its view upon the correctness of the Leipzig decision.

The Attorney-General, in arguing the defendant's case, said: "Is the ten years period under the Act of 1870 interrupted by any return to Germany? If it is, cadit quaestio. If on the other hand it depends upon intention, the party claiming statelessness on January 10, 1920, must satisfy the Court as to what his intention was, that is, whether he intended to retain his citizenship and his home connection or not."

The plaintiffs say that this is not the true view, because for the purposes of this action they have each obtained a certificate of statelessness from the Governor of Birkenfeld. They strenuously contend that in this Court, as they allege would be the case in a German Court, that certificate is conclusive unless its accuracy is disproved. I will consider the question as to what weight this Court ought to give to these certificates after I have referred to further matters proved in evidence.

A number of documents have been put in evidence, which I will refer to in order of date, except in the case of the police register entries in which I refer to the date of the copies.

The first set of documents, put in by the defendant, are three applications for exemption from internment in 1915. In these applications each plaintiff stated that his nationality in 1915 was German, and they gave particulars as to visits to Germany since they came to live in England or Paris. Rudolph, who lived in Paris, stated that since 1893 he had visited England about twice a year for about a fortnight, and that from April, 1886, to April, 1887, he served for one year in the German army, and since that time on four occasions for six weeks, the last being in 1896. Eugen stated that he had resided twenty-two years in England, and that in the course of his business he usually made about ten journeys each year to Paris for periods ranging from one or two days to three weeks. He also nominally had a branch at Idar, but little or no business had been transacted there, and his two annual visits there were really for the purpose of seeing his mother for two days or a week. Paul stated that he had been in England twenty-two years, that he lived

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at Surbiton, and had been to Idar once a year for a week to see his mother.

The next document, also put in by the defendant, is an application for German debt claims under arts. 296 and 72 of the Peace Treaty. That was a claim made by the plaintiffs' firm, Rudolph Hahn & Sons, through the German Clearing Office on June 30, 1921. It states their nationality as German, and they claimed about 7000*l.* from the Public Trustee as a foreign debtor. The application was signed by Eugen for the firm, Rudolph Hahn & Sons, the name in which the plaintiffs had carried on business in London and Paris and after 1920 in Amsterdam. The Rudolph Hahn in the firm name was the plaintiffs' father, who had carried on a similar business at Idar under that style until his death in 1920.

On January 29, 1923, the plaintiffs, who in 1915 and 1921 had stated that their nationality was German, obtained from the Government and President of Birkenfeld, obviously for the purpose of such an action as this, three certificates that they were Stateless. The certificates, put in by the plaintiffs, were in the following form: "The merchant Rudolph Hahn born on July 8, 1863, at Idar (part of the Oldenburg Country Birkenfeld) left for London in the year 1893 and later for Paris in accordance with his statements confirmed as correct by the local authority at Idar. Together with his two brothers Eugen Hahn and Paul Hahn he carried on a business in precious stones under the firm Rudolph Hahn & Sons in the two cities mentioned until the outbreak of the war. He only returned to Germany in spring 1918 after having been released from the internment camp in England. Therefore Hahn in accordance with para. 13, figure 3, of the law of June 1, 1870, forfeited his nationality (or subjectship to the German State). Hahn has not recovered his German State subjectship after forfeiting the same and therefore according to the German law he did not belong to any State and was Stateless on January 10, 1920. The Government did not receive any communication from the German Consul as to any entry in his register book." That certificate is signed by Herr Dorr, the President

of the Birkenfeld Government, whose seal is attached. A practically similar certificate was given to Eugen and Paul.

Herr Dorr has given evidence before me. He stated that he inquired of the plaintiffs if the 1870 Act had been complied with, and having personal knowledge of the Hahn family during his many years residence at Idar, he thought he could check their answers. He said that two doubtful points arose on the application for the certificates. First, whether the German visits were interruptions of the ten years term. Secondly, whether there had been consular registration. He says that he and his Government decided the first point in the plaintiffs' favour and made a reservation as to the second. He says he made inquiries of the mayor of Idar. I do not know the exact inquiries, but the mayor appears to have been of the same opinion on the first point. Herr Dorr said that he found no entry in any official records to the contrary, nor were any brought to his notice, though he cannot say he directed a search. Then he made this curious statement—namely, that he could not remember whether he had ever before given a certificate of statelessness. This does not surprise me, because from the evidence before me I have little doubt that certificates of statelessness were entirely unknown in Germany until they acquired importance under the Peace Treaty.

In cross-examination Herr Dorr said that his authority to grant these certificates was derived from s. 39 of the 1913 Act. In this he was entirely wrong. Sect. 39 gives no authority to grant anything of the sort. Herr Dorr admitted that in the regulations issued by the Federal Council there was no reference to a certificate of statelessness and no form thereof, as there was in respect of the other matters provided for by s. 39. He also said that if any of the plaintiffs had Prussian nationality the Birkenfeld Government could not have given a certificate of statelessness, and it seems reasonably clear that this small province must limit its certificates to matters within its knowledge and competence.

Herr Dorr also stated that the effect of Rudolph having been an officer in the Prussian army was not, as far as he

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knew, considered by him or his Government, and it does not appear that in giving these certificates Herr Dorr had any knowledge of the plaintiffs' previous statements as to their German nationality in 1915 and 1921. These certificates state that the plaintiffs left Germany in 1893 and only returned to Germany in 1917 or 1918 and on the face of them appear to have been based on that recital of fact. Even assuming, as one of the plaintiffs' experts says, that the word translated "returned" means "returned for good" there is no mention of the many annual visits in the interim, or of their character and circumstances.

The further evidence as to the certificates is as follows: Dr. Baerwald, the plaintiffs' first expert, stated in chief that in Germany the certificate is only prima facie evidence in the absence of proof to the contrary.

Dr. Loewenfeld, their second expert, said that any Court in Germany can go behind the prima facie evidence of these certificates, and would be the more ready to do so if they were retrospective and referred to a long past date, as in the present case. He had never heard of a certificate of statelessness being given before the war. Before the war there were no certificates in Germany similar to Herr Dorr's, and it was not within his competence to certify statelessness outside of Oldenburg. If such a certificate came before the Leipzig Court, it would decide the issue for itself, on the evidence before it, in accordance with its long continued series of decisions and practice.

Dr. Weil, the defendant's expert, stated, as the plaintiffs' experts had stated, that apart altogether from s. 39 of the 1913 Act Herr Dorr would have general jurisdiction to give certificates of loss of nationality as regards his particular State. But if in an action in Germany based on such a certificate the defendant opposed the plaintiffs' claim and gave rebutting evidence, the certificate in a German Court would not be even prima facie evidence of its contents.

The next documents put in by the defendant were three statutory declarations in Form T 203 made by the plaintiffs in February, 1923, for the purpose of setting

up as against the Public Trustee the fact that they were not German nationals on January 10, 1920, within the Peace Treaty. Being asked to give full particulars of his German visits Rudolph replied, " At Christmas, 1903, for four days ; in August, 1909, for a few days for a holiday." That statement is wholly false. It is not even in accordance with the information given by him in his claim for exemption from internment, and on the evidence in this action it is entirely untrue. Eugen gave his total German visits as, " In August, 1899, for nearly two weeks." That again is obviously false. Paul replied, " Only once that I can remember, when I went over on business for a few days only in 1904." That again is wholly and absolutely untrue.

After the commencement of this action the plaintiffs' solicitors, appreciating the falsity of these declarations, wrote to the defendant's solicitors on January 15, 1924, with a view to mitigating this attempt to mislead. They say : " We find that certain statements contained in the declarations of Rudolph, Eugen and Paul Hahn, which were forwarded to the Public Trustee some time ago were not strictly accurate. These inaccuracies appear to be due to the fact that the questions replied to were not properly understood ; but we think it right that we should give you full information." It is almost amusing to imagine that these plaintiffs who had lived so long out of Germany and for years successfully defrauded the Revenue by false declarations in their returns should not understand the perfectly simple question in the declaration form. In any case they have not come here to say so. In reference to the question, " Have you done military service in Germany ? " the letter states " Rudolph and Eugen Hahn state that they understood this question to refer to service during the war and consequently they each replied thereto, ' No.' In fact both of them served many years ago," and then particulars are given. The letter proceeds, " Question 10 on the form is as to whether the applicant has visited or passed through Germany or any German colony, since ceasing to reside in Germany. . . . . All three applicants state that so far as possible they gave

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particulars of those visits, the dates of which they could remember, and thought this would be sufficient. Rudolph Hahn now states that after 1896 he made occasional visits to Idar to see his mother. It is impossible to give the dates of these other than those mentioned in the declaration and one in December, 1913. The other visits made have taken place about once in three years, and were for a period of two or three days each." Then a number of similar statements are made as to Eugen and Paul and the letter concludes.

The next documents, put in by the plaintiffs, are six certified copies of entries in the police register at Idar, which copies were obtained on January 6, 1925. Three relate to the plaintiffs' arrival at Idar in 1917 and 1918 and three to their departure in 1920. Under the head "State subjectship or political nationality" all six copies have the entry "Not subject of any State." [Staatenlos.] It is rather difficult to know how to deal with these entries, on which the Attorney-General has made very serious comments. The register was produced by the mayor of Idar on the commission to take evidence there. He only became mayor in September, 1924. Whether the words, "Not subject of any State," were written by the plaintiffs themselves, or by some official, we do not know, and I have no alternative but to accept these copies as copies of a register in the mayor's possession. But how that statement came to be filled in, especially in 1917 and 1918, it is extremely difficult to understand. The only people who can really explain it are the plaintiffs, and they have not come here to give evidence, because if they came they would probably be arrested for their abuse of this country's hospitality. It is a strange thing that as early as 1917 any one of them at Idar should have appreciated that it might be of any advantage to say, "Not subject of any State," seeing that in 1915 they had stated here that they were of German nationality. It is equally strange that having repeated, if they did repeat, the same statements when they left Idar in 1920, they should in June, 1921, claim a 7000*l.* debt here on the footing that they were of German nationality.

The next document, put in by the defendant, is a copy of an entry in the commercial register for the district in which Idar is situated. The copy is dated April 5, 1924, but the entry is old, as it was transferred from the old register on October 23, 1912. The firm is described as "Rudolph Hahn, Idar." The partner personally liable is given as "Eugen Hahn of Idar, now in London, merchant." It is therefore quite plain that after the plaintiffs came to London in 1893 Eugen registered himself in this commercial register. Then there is the entry, "Power to sign on behalf of the firm is granted to Rudolph Hahn, merchant of Idar, now in Paris, as well as Auguste, née Engel, at Idar, widow of the merchant Rudolph Hahn and Julius Alexander Hahn, merchant of Idar." We have therefore another brother Rudolph described as a merchant of Idar, after he is said to have left his country for good, and generally it appears that there was a business at Idar under the style of Rudolph Hahn (the deceased father), the liable partner being Eugen, with power to sign for the firm given to Rudolph in Paris and his mother Auguste and brother Julius Alexander in Idar, so that there would be a person (Eugen) able to sign in London, a person (Rudolph) able to sign in Paris, and two people able to sign at Idar.

The plaintiffs rely on certain depositions taken on commission. I have already mentioned the mayor of Idar, who produced the police register. Then there is the evidence of the brother Julius. He says that "during the whole time since 1893 Rudolph came only at Christmas for two or three days to Idar with the exception possibly of one stay for military training. The other two brothers came also at Christmas. None of the three ever had the intention of returning to Germany."—This he is not entitled to say—"The firm of my father Rudolph Hahn in Idar is still in existence, but is doing no business. There are also stocks of old goods there which I am slowly disposing of"—per pro I suppose—"The owner of the firm, according to the commercial register, is Eugen, but since 1893 he has not troubled in any way about the business and has no interest in it"—Eugen stated

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in his application for exemption from internment in 1915 that he was nominally a merchant in Idar—"I have full power of attorney," and so on. So that these three plaintiffs, who could not remember more than one or two odd visits to Germany when they had to fill in the form claiming their property from the Public Trustee, are now shown to have been in Germany every year.

Miss Hibbs, who was in the employ of Eugen and Paul from 1903 to 1915, said, "They lived in Surbiton except during their summer month's holiday and their Christmas holiday"—where they went during their month's summer holiday we are not told—"Rudolph frequently came from Paris, Paul and Eugen were away from two to three weeks at Christmas, and Eugen was often away."

There is one further document. After the conflicting decisions had been given by the Leipzig Court and the Administrative Courts, Executive Ordinances were made with the view of getting some regularity in practice. I need only refer to one made by the Prussian Minister of the Interior on August 27, 1903. It refers to the conflicting decisions on the meaning of "uninterrupted residence" in s. 21 of the 1870 Act, and proceeds: "In order to remove, for the competent authorities, the legal uncertainty arising out of the difference of opinion of the highest Courts, I have the honour to request that you will base your decisions on the application of para. 21 of the Law of Nationality, for the present, according to the reading of the Reichsgericht"—i.e., the Leipzig Court—"which has hitherto always been done here." These were Ordinances directed by the Executive of Prussia and a number of other German States to the Governments of the various States under their control, requesting them to follow the Leipzig decision.

Apart from what I have already read the expert evidence was shortly as follows:—

Dr. Baerwald said: "Counterproof would of course be admitted in any German Court with regard to these Dorr certificates of statelessness. The Administrative Courts are of high rank. There are two conflicting opinions as to the

meaning of uninterrupted residence abroad. I prefer the Administrative Court view." In cross-examination he said: "There are several Leipzig decisions consistently holding the view as to temporary interruptions, and the Prussian, Saxon, and Wurtemburg Ministries have all accepted the Leipzig view." He then referred to Kahn's Commentary, where it is stated that a similar view has been adopted by all Governments of the Federal States who have had to deal with the question. As to the Administrative Court decisions he said, "In the Bavarian case it was held that the intention of the person in question may or may not be relevant." He also said, "The plaintiffs' statements, though made long after the expiry of the ten years term, might be considered relevant in a German Administrative Court on the question of their previous intention. The number and nature of their returns to Germany and the circumstances connected therewith would have to be all inquired into in any German Court." He then dealt with the German jurists. It appears that Laband and Seydel, the leading jurists who have written general commentaries, more or less take the view that the Administrative Courts are right, but they differ in several respects. For instance, Laband thinks that intention is wholly irrelevant. Some Administrative Courts take this view, others the contrary. Seydel in general takes the view of the Administrative Courts, but he says that the circumstances of German visits must be inquired into, and a visit for a cure would break the ten years term. Dr. Kahn on the other hand adheres to the Leipzig view. The jurists who have written monographs on the particular point, with one exception, follow the Leipzig view. Dr. Baerwald also said that there is no express law in Germany providing for the granting of a certificate of statelessness and no form of such a certificate has ever been issued by any Government authority.

Dr. Loewenfeld agrees with Dr. Baerwald that if there is any power to issue a certificate of statelessness, it would be within the province of the various State Governments under the general law. He said: "A German Court on proof of

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necessary facts can always go into the validity of a certificate, but the Court will not lightly doubt its force. In the Administrative Court decisions, which I prefer, different opinions are taken as to the question of intention and the degree of interruption necessary to break the ten years term. When, however, you depart from the natural meaning of words in a statute, difference of opinion must necessarily arise, and the exact number and character of the German visits must of necessity be important, and any contradictory statements previously made by the holder of the certificate would be carefully scrutinised in a German Court."

Dr. Weil thinks that Rudolph as an officer of the Reserve would obtain Prussian nationality during the term of his commission, which would run until actual discharge. The other experts think that an officer passes into the Landsturm automatically on attaining thirty-nine, and his commission is automatically discharged. Apart from the further light that may be thrown thereby upon the reliability of the Dorr certificates, it does not matter which view is right.

Dr. Weil says: "The Leipzig Court has ruled in a considered judgment, that uninterrupted stay must be taken in its physical sense only, and has consistently held ever since that every stay in Germany interrupts the ten years period. The Economic Court has followed this view in practice, without giving any considered reasons. The executive authorities throughout Germany have followed the same view. That view is right, but in construing or applying it there ought not to be exaggeration, e.g., if a man residing abroad were compulsorily taken over Germany in an aeroplane or possibly paid one short visit to see a sick relative, there is not necessarily interruption, but in the latter case the Court must know all the facts and circumstances."

The plaintiffs contend that on the true view of the German law I ought to hold that the Administrative Courts are right. I can do nothing of the kind. I have no competence to decide which of two sets of German Courts are the best interpreters of the German statutes.

The plaintiffs' main contention, however, is that in the

circumstances of this case the Dorr certificates are binding and conclusive upon me. They put their argument as follows: "These certificates are binding until they are displaced. They were issued by the proper Government authority with full knowledge of the facts, and they constitute decisions in rem. The only question arising on such certificates is which set of decisions ought to prevail, Leipzig Court or Administrative Courts. No German Court on that ground alone would go behind a certificate, though obviously granted in accordance with one set of decisions and contrary to the other set. A mere doubt in law as to whether a certificate is founded on the better class of decision is insufficient to challenge it. Unless shown to be wrong according to German law no Court can go behind it. In the present case the English Court cannot possibly hold that the certificates were wrong according to German law."

I cannot accede to these arguments. It is perfectly plain that these certificates, even assuming that they were issued by the proper and competent authority, are only prima facie evidence of the statelessness they certify. It would be a strange thing if a lay governor of an obscure German State could grant a certificate contrary to the decision of the highest Court in the land, with the result that if the certificate came before that Court, it would be powerless to decide the interpretation of s. 21 according to its own view, but would be bound to take the view expressed by the grantor of the certificate. This is directly negatived by the expert evidence. It is admitted that certificates of this character are only prima facie evidence, and the expert evidence shows that notwithstanding their prima facie validity in a German Court, that Court on having facts brought before it raising a serious question whether the statelessness certified was really a fact or not, would be not only entitled but bound to decide the question according to its own view of the German law.

Suppose the plaintiffs had gone before a German Administrative Court, the Court most favourable to their contentions, armed with these certificates and asked the Court to act on

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them. Suppose their opponent had proved that they had been guilty of a long course of fraudulent conduct, and had made statements and declarations absolutely contrary to the statelessness certified. I cannot believe, having regard to the expert evidence, that the Court would refrain from inquiring into what in truth and in fact was the correct state of circumstances as to this so-called statelessness, and from requiring some explanation and evidence from the plaintiffs of the matters so given in evidence against them.

Having regard to what has been proved before me, and the absence of any evidence by the plaintiffs in answer, I have no hesitation in finding that the plaintiffs' contentions as to the binding and conclusive effect of the Dorr certificates are ill founded. It is not within my province to consider or discuss how far these contentions, if sound, would or might affect the value to this country of the charging provisions of the Treaty of Peace Order.

As a result, being still of opinion that notwithstanding the plaintiffs' argument and the production of the certificates, the final onus is on the plaintiffs, I have come to the following conclusions :—

(1.) If the Leipzig and Economic Court decisions and the view of the German Executive are correct, the plaintiffs necessarily fail.

(2.) If on the other hand the Administrative Court view is to be preferred, then the evidence and general facts are consistent with the plaintiffs having possibly had throughout an intention to retain their German business and home connections. Their declarations and conduct require the closest scrutiny, and they have given no evidence of their own in support of their claim and in answer to the defendant's evidence. It is impossible in my opinion to say that even in a German Administrative Court they would have been held to have made out their case on the materials before me.

(3.) In any event the question depends upon the German law as to the effect of the 1870 Act which I am unable and incompetent to construe for myself, and it is plainly impossible for me in the circumstances proved in this case to say what

the unquestionable and undoubted German law on the subject is, if it exists, when the highest German Courts and jurists differ diametrically upon it, and the executive authorities in this state of affairs insist on the Leipzig construction of s. 21 of the 1870 Act being observed by those under their control.

For these reasons I hold that none of the plaintiffs have proved that their German nationality was lost before January 10, 1920, and therefore this action must be dismissed with costs.

[His Lordship expressed his opinion that this was a proper case for three counsel.]

Solicitors: *Churchill, Clapham & Co.; Coward, Chance & Co.*

G. R. A.

In re TAYLOR.

HOCKLEY *v.* O'NEAL.

[1924. T. 837.]

Will—Construction—Discretionary Trust for Maintenance—Infant—Illegitimacy—Ignorance of Testatrix.

A testatrix devised and bequeathed all the residue of her estate to trustees upon trust for conversion and division into fourteen parts, and as to one-fourteenth part thereof she directed her trustees in their absolute discretion "during the life of the widow of the late L. J. W. L. H." to pay all or any part of the income arising therefrom for the maintenance and personal benefit of the widow, her issue by L. J. W. L. H., and subject thereto to hold the said fourteenth share in trust for the child or children of L. J. W. L. H. who being a son should attain twenty-one, or being a daughter should attain that age or marry. L. J. W. L. H. was a great-nephew of the testatrix and died on active service in her lifetime leaving one daughter, the infant defendant, who was born before the marriage of her parents. The testatrix had knowledge of the existence of this child, but not that the child was illegitimate:—

Held, that having regard to this want of knowledge the case did not come within the first class of cases stated by Lord Cairns in *Hill* v. *Crook* (1873) L. R. 6 H. L. 265, 282, in which the prima facie interpretation of "child" or "children" was departed from.

Held, therefore, that the infant defendant was not entitled to have

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any part of the income of this fourteenth share applied for her maintenance, nor had she any interest in the capital.

Holt v. *Sindrey* (1868) L. R. 7 Eq. 170; 38 L. J. (Ch.) 126 and *Lord Woodhouselee* v. *Dalrymple* (1817) 2 Mer. 419 distinguished.

By her will dated May 1, 1917, Margaret Overbury Taylor, after making certain specific and pecuniary bequests, devised and bequeathed all the residue of her estate to trustees upon trust for sale and conversion and after the payment of a certain annuity to divide the residuary estate into fourteen equal parts, and to hold two-fourteenths thereof in trust for the defendant, Violet Frederica O'Neal, absolutely, and after disposing of eleven-fourteenths as therein appeared, the testatrix directed her trustees as to the remaining one-fourteenth of her residuary estate, in their absolute discretion during the life of the widow of the late L. J. W. L. H., or during such shorter period as they should think fit, to pay all or any part of the income arising therefrom unto or apply the same for the maintenance and personal support or benefit of all or any one or more of the following persons—namely, the said widow, her issue by the said L. J. W. L. H., whether minors or adults, and the other persons for the time being entitled to or interested in the said share of her residuary estate under the trusts to take effect after the death of the said widow, in such proportions as her trustees should in their absolute and uncontrolled discretion think proper, and subject thereto she directed her trustees to hold the said one-fourteenth share of her residuary estate in trust for the child or children of L. J. W. L. H., who being sons should attain twenty-one, or being daughters should attain that age or marry, and if more than one in equal shares absolutely, but if there should be no such child she directed that the said trust premises and the income thereof should go and accrue by way of addition to the share of residue bequeathed in trust for Violet Frederica O'Neal.

The testatrix died on February 8, 1918, and her will was duly proved. The defendant, Violet Frederica O'Neal, was her sole next of kin. It appeared from the evidence that the infant defendant, M. F. H., was born on May 8, 1915,

and her parents were not married until November 4, 1915. L. J. W. L. H. predeceased the testatrix, and died on December 19, 1916, on active service. M. F. H. was his only child. By an affidavit made by W. E. J. Mourilyan (a solicitor and one of the original plaintiffs, but since deceased), there was exhibited a letter dated December 6, 1916, from the testatrix to the deponent, in which she stated: "I beg to enclose a copy of a letter from Mrs. O'Neal received from Mrs. L. H. giving her the news of her husband's death in battle, and of her being left a widow with one child." The affidavit further stated that the testatrix had told the deponent on several occasions that her great nephew, L. J. W. L. H., who was born and lived in India, had married, and that she had heard that he had died leaving a widow and at least one child, but she desired to make provision in her will in case he had more than one child. There was no evidence that the testatrix knew of the illegitimacy of the infant defendant.

The plaintiff as the surviving trustee of the will of the testatrix by an originating summons asked (inter alia) whether he could properly in his discretion apply any part of the income of the one-fourteenth part of the residuary estate bequeathed on a discretionary trust during the life of the widow of L. J. W. L. H. in or towards the maintenance of the infant defendant M. F. H., and whether the said infant was interested, and if so to what extent, in the capital of such share after the death of her mother.

Chetwynd Leech for the trustee.

Horace Freeman for Mrs. O'Neal. On the question in which the infant is concerned, the facts as the testatrix knew them were consistent with the child being legitimate. There is nothing to show that she meant to benefit this particular child. In *In re Eve* (1) the testatrix knew of the illegitimacy. In order that an illegitimate child may take it must be conclusively shown that there was nobody else whom the testator or testatrix intended to benefit. In *In re Herbert's*

(1) [1909] 1 Ch. 796.

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Trusts (1) the importance of the testator's knowledge of the facts is emphasized, and these cases show the importance of there being evidence showing the knowledge which the testatrix had of the state of the family.

Timins for three other defendants beneficially interested.

W. G. Hart for the infant defendant. No doubt a gift to a child, or children, or issue of a person prima facie means a legitimate child, or legitimate children or issue, but an intention to benefit illegitimate children may be shown without naming them, and without referring to their illegitimacy: Jarman on Wills, 6th ed., pp. 1752, 1754, 1760. Consequently, a gift to the children of C., a person who at the date of the will was dead, leaving illegitimate children but no legitimate, is good, if the fact that C. was dead and that he had illegitimate children were known to the testator. It is submitted that it is sufficient that the testator should know of the existence of persons reputed to be the children of a deceased person. In *Hill* v. *Crook* (2) Lord Cairns stated the two classes of cases which were exceptions to the prima facie general rule, and he referred to *Holt* v. *Sindrey* (3), which carries me home, and brings the present case within the first class referred to by Lord Cairns. *In re Du Bochet* (4) was a similar case before Joyce J., but it was not followed in *In re Brown* (5) and *In re Pearce.* (6) In *Lord Woodhouselee* v. *Dalrymple* (7) a legacy given to the children of the late Charles Ker, who should be living at the testator's death, was held to entitle illegitimate children of Charles Ker to the fund there in question, the evidence being that Charles Ker never had any legitimate children. Here the evidence proves that the testator knew that L. J. W. L. H. was dead, and had left at least one child. It is submitted that it is immaterial that the testatrix did not know that the only issue of Mrs. H. was an illegitimate child.

Horace Freeman in reply. As to *Holt* v. *Sindrey* (3) there was

(1) (1860) 1 J. & H. 121.
(2) L. R. 6 H. L. 265.
(3) L. R. 7 Eq. 170.
(4) [1901] 2 Ch. 441.
(5) (1890) 63 L. T. 159.
(6) [1914] 1 Ch. 254.
(7) 2 Mer. 419.

evidence of intimate knowledge of the child by the testator, and the question of identity was introduced. Here there is an absence of both those elements.

EVE J. [after stating the provisions of the will continued :] The letter of December 6, 1916, written by the testatrix herself, proves her knowledge of the fact that L. J. W. L. H. had died leaving a widow and one child. It turns out that the child was born before the marriage of her parents, and is therefore illegitimate. Two questions are raised by the summons, the one whether, in the exercise of their discretion, the trustees can apply any part of the income of the one-fourteenth share for the maintenance of this child, and the other whether, on the death of the widow, this child can take anything under the trust in remainder for " the child or children of L. J. W. L. H., who being a son shall attain twenty-one or being a daughter shall attain that age or marry."

The answers depend upon the further question whether the will of the testatrix ought to be construed as including this illegitimate child. Prima facie the words " child or children " mean legitimate child or children, and no other meaning can be given to them unless there is clear evidence in the will itself of an intention to establish another application of the words. There are as I read the authorities two classes of cases only in which the prima facie meaning can properly be departed from. They are stated by Lord Cairns in *Hill* v. *Crook* (1), where he says : " One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way :—Suppose there is a bequest ' to the children of my daughter Jane,' Jane being dead and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except

(1) L. R. 6 H. L. 265, 282.

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illegitimate children, rather than that the bequest should fail altogether the Court will hold that those illegitimate children are intended, and they will take under the term 'children.' . . . . The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its prima facie meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children." That the only exceptions are the two classes mentioned is clear from the judgments in *Dorin* v. *Dorin* (1) and *In re Pearce.* (2) The second exception has no application on the present occasion, but Mr. Hart has argued on behalf of the child that the circumstances bring the case sufficiently within the former class to make her an object of the testatrix's bounty.

I cannot see my way to accede to his argument. The first exception is only made in cases where the testator must be taken to have known that the circumstances were such that there could be no legitimate child to take. What does this involve? Is it enough that the testatrix knew that L. J. W. L. H. was dead and had left a widow and one child? I think not. Lord Cairns, it is true, states the exception as applying where it is impossible in the circumstances of the parties that any legitimate child can take, but he takes into account as one of the circumstances of the parties the testator's knowledge of the state of his family, and therefore it is that I have expressed the view that the exception is only made in cases where the testator must be taken to have known that there was an illegitimate child and that there could be no legitimate one to take. Lord Phillimore in his judgment in *In re Pearce* (3) expresses a doubt whether the rule applies where the testator has an incorrect belief as to the state of the family, by which I take it he means to express a doubt whether the exception applies to cases where the testator knows there can be no more

(1) (1875) L. R. 7 H. L. 568.
(2) (1914) 83 L. J. (Ch.) 266; [1914] 1 Ch. 254.
(3) [1914] 1 Ch. 269.

children, but is ignorant of the fact that those in existence are all illegitimate.

In the present case the testatrix certainly had no knowledge of the illegitimacy. She knew that the father was dead and had left this child surviving, and in the circumstances she must, I think, be regarded as having used the words, " child or children "—it would almost seem from her language as though she were providing for the contingency of a possible posthumous child—in their primary meaning and in circumstances which preclude the application of the exception relied upon. As was said by Sargant J. in his judgment in *In re Pearce* (1) : " The fact that a testator did not know of the illegitimacy prevents the conclusion that the testator is putting any artificial meaning on the word 'children.'"

Mr. Hart relied on the cases of *Holt* v. *Sindrey* (2) and *Lord Woodhouselee* v. *Dalrymple* (3), but I do not think they are applicable to the circumstances with which I have to deal here. Each was a case " in which on the face of the will and from the expressions used you could gather that the testator intended to describe and denote these existing illegitimate children as children. They were sufficiently described in the will as legatees." I am again quoting from Sargant J.'s judgment. (4) Much as I regret the conclusion at which I have arrived, I am constrained to hold that the infant is not entitled to have any part of the income of this fourteenth share applied for her maintenance nor has she any interest in the capital.

Solicitors : *M. L. Evans ; Hicks, Arnold & Bender ; Walter H. Elwes.*

(1) [1913] 2 Ch. 674, 689.
(2) L. R. 7 Eq. 170 ; 38 L. J. (Ch.) 126.
(3) 2 Mer. 419.
(4) [1913] 2 Ch. 687.

G. M.

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July 10, 17.

Considered. Re COXEN. [1948] Ch. 747

In re PORTER.

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[1925. P. 383.]

Will—Bequest for Maintenance and Upkeep of Masonic Temple—Balance (if any) for Masonic Charities—Invalidity of primary Object—Whole Bequest void for Uncertainty.

By a codicil to his will a testator directed his executors, on the death of his wife, to pay from his estate to the trustees of a masonic temple, erected by him to the memory of his son, 10,000*l.*, to be invested and the interest applied by the trustees, in their full and sole discretion, to the maintenance and upkeep of the masonic temple, and the balance (if any) to be applied in favour of any masonic charities which the trustees might select.

The masonic temple was to be used for masonic ceremonies, and smaller rooms for lodge meetings, business, and meetings of a social but not political character. Upon a summons by the widow of the testator, who was also one of the executors, to ascertain whether the legacy was valid or not:—

Held: (1.) That the decisions in the "tomb cases" were inapplicable to an institution of this character, which was not a tomb.

(2.) That the whole income of the fund being charged with a trust, at the discretion of the trustees, for a primary object which was invalid, the Court was not entitled to control this discretion, and institute an inquiry at chambers as to the amount of income necessary to be applied for maintenance and upkeep of the temple, so that the gift of the balance would be valid.

Held, therefore, that as the primary gift was not sufficiently defined, the whole legacy was void for uncertainty.

In re Birkett (1878) 9 Ch. D. 576 and *Chapman* v. *Brown* (1801) 6 Ves. 404 discussed and followed.

ADJOURNED SUMMONS.

By his will dated April 14, 1917, William Porter, of Hylands, Dyke Road Avenue, Patcham, Sussex, appointed his wife Frances and his four sons to be the executors and trustees of his will, and devised and bequeathed all his property of whatever kind to his trustees upon trust for sale, conversion, and investment, and to pay the net income to his wife for her life or until remarriage, and on her death or remarriage to divide the capital of his estate equally between his four sons for their own absolute use and benefit. By a codicil to his will, dated August 17, 1921, the testator

provided as follows: "I direct my executors on the death of my wife to pay from my estate to the trustees of the Province of Sussex Masonic Temple, erected by me to the memory of my son, Sydney Porter, of the Royal Navy, the sum of 10,000*l.* free of duty (to be known thereafter as the 'Porter Trust Fund') such sum to be invested by such trustees in usual trust securities, and the trustees to apply the interest of such sum to the maintenance and upkeep of the said masonic temple in the full and sole discretion of the said trustees, and the balance (if any) to be applied or paid annually in favour of any masonic charity or charities which the said trustees may in their full discretion select." A site at Brighton for the proposed temple had been acquired by the testator in his lifetime and conveyed to trustees in fee simple to be held upon the trusts of a deed poll dated June 26, 1919, being trusts for the erection of a masonic temple, lodge rooms, and offices as a memorial to the testator's son, Cadet Sydney Porter, R.N., who died at the Royal Naval College Hospital on March 5, 1917. Between 1919, when the foundation stone of the temple was laid, and 1922 the testator paid to the trustees 9289*l.* 12*s.* for the purpose of carrying out the proposed work. Down to the death of the testator the work consisted principally of excavation and preparation for the building. The testator died on January 9, 1924, and his will was proved by the widow and one of the four sons, power being reserved to the other three sons to come in and prove.

The testator was twice married, and the plaintiff, Frances Porter, was his second wife. The estate consisted of house property and certain investments, the whole being sworn at 37,709*l.* 3*s.* The plaintiff took out an originating summons, to which the sons, certain of their infant children, the trustees of the masonic temple, and the Attorney-General were made respondents, for the determination of the question (inter alia) whether the legacy to the trustees of the Province of Sussex masonic temple was good, or whether it was altogether void, or applicable cy-pres. There was evidence that a masonic temple consisted usually of a hall or building used

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for masonic ceremonial or business purposes, and for banquets. Under the trusts of this particular temple as declared by the deed poll the large hall was to be used for ceremonials and smaller rooms for meetings of lodges and other social but non-political gatherings.

Willoughby Williams for the plaintiff.

Gover K.C. and *E. Ackroyd* for the four sons of the testator. This gift does not come within the line of what may be called the "tomb cases," where a gift has been made of the income of a fund for the upkeep of a testator's tomb—which is bad—and the rest of the income of the fund is to be applied for a charitable purpose. If the primary purpose of the gift is not for a valid charitable object then the further gift fails, unless the exact amount required for the invalid purpose can be ascertained, and then the gift of the surplus may be good; but if it cannot be ascertained then the whole fails: Theobald on Wills, 7th ed., pp. 370, 371, where the various propositions are stated and all the cases collected. The tomb cases having, it is submitted, no application to the present case it comes within *Chapman* v. *Brown* (1), where there was a gift for charities of the overplus after providing for a trust for an illegal primary object, and it was held that the whole gift was void for uncertainty, because it could not be ascertained what was necessary for the primary gift. The question here is what would be required for the maintenance and upkeep of this masonic temple, and that is far too vague and uncertain. The primary purpose is clearly illegal, and might exhaust the whole income of the 10,000*l.* and render the whole gift void for uncertainty. There might be no surplus at all.

[They also referred to *In re Taylor* (2) and *In re Rogerson.* (3)]

Vaisey K.C. and *E. Beaumont* for the trustees of the masonic temple. This building was originally intended by the testator as a memorial for his dead son, and the bequest comes within

(1) 6 Ves. 404. (2) (1888) 58 L. T. 538.
(3) [1901] 1 Ch. 715.

the principle applied in the "tomb cases." Having regard to the purposes for which this temple and rooms were to be applied we do not support the first part of the gift as itself a good charitable bequest. But the gift is twofold, and if the primary purpose fails for illegality the whole may be applied for the charitable purposes: *Fisk* v. *Attorney-General* (1); *In re Williams* (2), where the object was partly legal and partly illegal, the whole was given to the legal objects. *Chapman* v. *Brown* (3), which is relied upon as rendering the whole gift invalid, has been commented on in some of the later cases, such as *In re Birkett* (4); and in *Kelly* v. *Attorney-General* (5) it was expressly dissented from by the Master of the Rolls in Ireland. The cases are also discussed in Tyssen's Charitable Bequests, 2nd ed., pp. 148–150. But if these tomb cases do not apply to the present we submit that an inquiry might be directed as to the maximum sum that could be required for the illegal purpose of the upkeep of the temple, and that being treated as invalid whatever remained over would be applicable for the charities and constitute a valid gift. In *Mitford* v. *Reynolds* (6) an inquiry of a similar character to that suggested was ordered by the Lord Chancellor. On the present evidence before the Court it may not be possible to determine what sum would be necessary for the purpose required, so we ask for this inquiry to be directed. The Court would struggle to put some limit to the amount to be applied for maintenance of the temple.

Roope Reeve K.C. and *Swords* for infant children of the testator's sons contingently entitled on one construction of the will, which the Court rejected.

Dighton Pollock for the Attorney-General. The temple is only an adjunct to the real charity. Masonic lodges were referred to as engaged in charitable work in the statute 39 Geo. 3, c. 79, s. 5. It would be an extraordinary result if a comparatively small sum was all that was required for

(1) (1867) L. R. 4 Eq. 521.
(2) (1877) 5 Ch. D. 735.
(3) 6 Ves. 404.
(4) 9 Ch. D. 576.
(5) [1917] 1 I. R. 183.
(6) (1842) 1 Ph. 185, 197; (1848) 16 Sim. 105, 109.

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the upkeep of the temple, and yet the whole gift were to be held void. That would be clearly contrary to the testator's intention: *In re Rogerson* (1) applies.

EVE J. [after reading the gift contained in the codicil] continued: The testator died on January 9, 1924, having expended 9289*l.* in or towards the cost of erecting the temple at Brighton, and the question raised by the summons is whether the legacy of 10,000*l.* for its maintenance is good, or altogether void, or applicable cy-pres. By a masonic temple is meant a hall or building devoted to masonic purposes, which include ceremonial and business meetings and banquets. In this particular instance the trusts of the premises included in this temple were declared by a deed poll dated June 26, 1919, which provided for the use of the hereditaments subject to the trusts therein declared. The site for the temple was to be cleared, and there was to be erected a main temple for masonic ceremonials, and smaller rooms for lodge meetings and business, the costs of which were to be provided by William Porter, so that the gift of the testator represented the moneys to be laid out in erecting the temple and offices, and it was for the maintenance of this building that the bequest of 10,000*l.* was made. The sole management and furnishing of the premises was to be under the control of the trustees, and the smaller rooms were also to be used for meetings of a social character, but not for party or political meetings. That was the nature of the institution for which this legacy was intended. A legacy for the maintenance and upkeep of such a building is not a good charitable bequest, and this gift, involving, as it does, a perpetuity, must fail, unless the gift of the annual surplus in favour of the masonic charities can properly be construed as a gift of the whole income and not as a gift of what might remain after the void gift.

Mr. Vaisey, for the masonic trustees, argued that the case is indistinguishable from the line of cases which are designated as the "tomb cases." He relies on the fact that this building

(1) [1901] 1 Ch. 715.

was to be erected as and had been intended by the testator to be a memorial to his dead son, but that does not in any way constitute it a tomb, and having regard to the difficulty which Sir George Jessel expressed in discovering the principle on which the decisions in the tomb cases proceeded in treating the gift of the corpus as unaffected by the direction for the maintenance of the tomb, I do not think I ought to extend their application to something which certainly is not a tomb. Then the question is, can I arrive at any conclusion, either on the evidence before me, or by an inquiry in chambers, as to the amount of the income necessary to be applied for maintenance and upkeep and which the trustees, in the exercise of their discretion, ought not to exceed, and treating that as all that was intended for the maintenance and upkeep of the temple and therefore invalid, declare the surplus to be well settled for charitable purposes? I feel very great difficulty in adopting any such course. In my opinion the test to be applied for the solution of this question is whether the gift of the surplus to charity is a gift of the whole income, or a gift of what (if anything) will remain after the void gift has been satisfied. Is the extent or amount of the primary gift sufficiently defined to enable the Court to ascertain what was intended to be expended on it? If it is, then although the primary gift fails the corpus is not affected, and the whole income is applicable for charitable purposes, but if on the other hand the first object has not been so defined that the Court can fix the amount required for it then the whole must fail, because the whole income might be applied for the first object. Nor do I think it is open to me, as Mr. Vaisey suggests, to ascertain how much is required for the void object and to declare the gift of the balance valid. In *In re Birkett* (1) Sir George Jessel, after stating that the case was a singular illustration of the way in which our law gets altered, proceeds as follows (1): "I have no hesitation in saying that, if there were no authorities, I should feel very little difficulty in deciding quite in a different way from that in which I am about to decide. If there were no authorities, I should hold,

(1) 9 Ch. D. 578.

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where there is a gift of money upon trust to apply a portion of the income for a definite purpose, and then to apply the surplus for another purpose, that, if the first purpose were sufficiently defined to enable you to ascertain the amount of the income that would be required for it, and that purpose failed through the gift being invalid, the gift of the surplus would be unaffected beyond the amount so ascertained." Then as an instance, he says that if a man were to give the income of 10,000*l.* a year in trust in the first place to keep a tombstone in repair, which could not exceed 20*l.*, and directed the residue of the 10,000*l.* a year to go to a charity, he should assume that good law and common sense would concur in saying that the 20*l.* gift was void, and that the 9980*l.* was well given to charity. That is what Mr. Vaisey is asking me to do here, to hold that the gift of what is required for the masonic temple is void, but that the rest is well given to the charities. But the Master of the Rolls adds (1): "If the first object is not so defined that you can reasonably ascertain the amount required, the whole must fail, because you might then apply the whole of the gift to the first object; and therefore, if you could apply the whole of the income properly and fairly to the first object, there would, of course, be no ascertainable residue." Authority for that proposition is to be found in *Chapman* v. *Brown* (2); *Fisk* v. *Attorney-General* (3); and *In re Taylor*. (4) On which side of the line does this particular case fall? The primary purpose of the gift is the maintenance and upkeep of the temple, and the whole income is charged with that trust, and as the expenditure is at the sole discretion of the trustees, they may properly apply the whole. Is the Court entitled to control this discretion and to define the limits within which the expenditure ought to be kept? Could it in fact ascertain with any certainty whether there would be any surplus or not after providing for this primary object? I do not think it would be possible. The whole income might be properly so applied, and if so there would be no available surplus. It

(1) 9 Ch. D. 579.
(2) 6 Ves. 404.
(3) L. R. 4 Eq. 521.
(4) 58 L. T. 538.

is clear that the testator contemplated that the whole might be required. In my opinion it results from this, that the ultimate gift for the charities is too indefinite and uncertain, and I must hold that the whole gift is void.

Solicitors: *Quicke & Card, for Montague Williams & Son, Brighton; Walbrock & Hosken, for Brighouse, Jones & Co., Southport; Long & Gardiner, for F. W. A. Cushman, Brighton; Solicitor to the Treasury.*

G. M.

ROCHESTER AND CHATHAM JOINT SEWERAGE BOARD *v.* CLINCH.

[1925. R. 372.]

Landlord and Tenant—Agricultural Holding—Severance of Reversion—No legal Apportionment—Notice to quit by both Reversioners—Subsequent Contract for Sale of Part by one Reversioner—Effect on Notice to quit—Agricultural Holdings Act, 1923 (13 *&* 14 *Geo.* 5, *c.* 9), *s.* 26, *sub-s.* 1.

Where the reversion on an agricultural holding, held by a tenant from year to year, is severed, without any legal apportionment of the rent, a valid notice to quit the entire holding, given by both reversioners, is not nullified by a subsequent contract by one reversioner to sell his part of the holding.

Agricultural Holdings Act, 1923, s. 26, sub-s. 1, explained.

WITNESS ACTION.

By a tenancy agreement dated May 20, 1912, Betsy Tuff let a farm to the defendant from year to year from October 11, 1911, at a rent of 150*l.*

By a conveyance on sale dated December 23, 1914, Betsy Tuff conveyed Blackacre (about half the farm) to the plaintiffs for 5400*l.*, subject to and with the benefit of the tenancy agreement.

Betsy Tuff and the plaintiffs then agreed (inter se) that the 150*l.* rent should be apportioned as to 70*l.* on Blackacre and as to 80*l.* on Whiteacre, the other part of the farm. The defendant was given notice of this apportionment. He did not however consent thereto, but continued to pay his whole

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150*l.* rent to Betsy Tuff, who paid over the 70*l.* to the plaintiffs. On January 4, 1919, Betsy Tuff died, and the defendant thereafter paid the entire rent to her executors, who paid over the 70*l.* portion to the plaintiffs. After October 11, 1922, the rent fell into arrear.

By a notice to quit, dated October 10, 1923, the agents of Betsy Tuff's executors, the present landlords of part of the farm, and the agent of the plaintiffs, the present landlords of the other part of the farm, gave the defendant notice to quit the farm on October 11, 1924.

By an agreement dated October 1, 1924, Betsy Tuff's executors agreed to sell Whiteacre to the defendant for 1500*l.*, subject to his tenancy agreement and subject to an unexpired lease of a sandpit.

On February 13, 1925, the defendant, not having given up possession of Blackacre, the plaintiffs commenced this action (inter alia) for a declaration that the tenancy agreement was duly determined by the notice to quit and an order for recovery of possession of Blackacre.

The defendant admitted that the notice to quit was valid in its inception, but contended that, having regard to the subsequent contract for sale of Whiteacre, it was nullified by the Agricultural Holdings Act, 1923, s. 26, sub-s. 1, which provides that on the making of any contract for sale of a holding, or any part of a holding, held by a tenant from year to year, any then current and unexpired notice to determine the tenancy of the holding given to the tenant either before or after the commencement of this Act [July 7, 1923] shall, "if the contract for sale is made by the person by whom the notice to quit was given," be null and void, with an exception not material hereto.

Archer K.C. and *Arnold Jolly* for the plaintiffs. There is no decision on the present section. It first appeared in the Agricultural Land Sales (Restriction of Notices to Quit) Act, 1919 (9 & 10 Geo. 5, c. 63), s. 1, without the conditional words, "if the contract for sale is made by the person by whom the notice to quit was given." On that section

Russell J. held that a sub-sale by a person who had nothing to do with the notice to quit nullified that notice: see *Robinson* v. *Nesbit*. (1) The conditional words were then inserted by the Agriculture Act, 1920 (10 & 11 Geo. 5, c. 76), s. 29, sch. 1, and the section assumed its present form.

In *Blay* v. *Dadswell* (2) the Court of Appeal held that the insertion of the conditional words was not retrospective. They also held that the original section applied to a sale to the tenant himself. They were unable to discover the mischief aimed at by the section. (3)

The present section is difficult, but the language of the condition is plain. The section only operates if the contract is made by the person or persons who gave the notice to quit. Here the contract was only made by some of those persons, and therefore the section does not apply.

W. J. Whittaker for the defendant. The conditional words were obviously inserted for the sole purpose of meeting the decision in *Robinson* v. *Nesbit* (1) and preventing a subsequent sale by a stranger to the notice to quit nullifying that notice.

In the present case Betsy Tuff's executors, so far from being strangers, were necessary parties to the notice to quit the entire holding, the only possible valid notice in the circumstances: *In re Bebington's Tenancy*. (4)

[ASTBURY J. They could not give notice to quit the entire holding.]

Not by themselves. But in combination with the plaintiffs they could and did give that one, entire, and indivisible notice. They therefore fall within the conditional words.

If the plaintiffs' construction is correct, a joint contract by Betsy Tuff's executors and the plaintiffs to sell Whiteacre and Blackacre in one lot would nullify the notice to quit, but separate contracts to sell Whiteacre and Blackacre would not do so. If that was the intention of the Legislature the section could easily be evaded by a friendly severance of the reversion followed first by a joint notice to quit the entirety, and secondly by separate contracts for sale of the

(1) [1920] W. N. 57.
(2) [1922] 1 K. B. 632.
(3) [1922] 1 K. B. 637, 638.
(4) [1921] 1 Ch. 559.

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respective reversions. The landlord could then always manage to sell with possession, which according to the arguments in *Blay* v. *Dadswell* (1) was the very mischief the Legislature was aiming at.

ASTBURY J. [after stating the facts:] It is admitted that the notice to quit was valid in its inception, so that it is unnecessary to consider the terms of the tenancy agreement. The sole question is as to the effect of s. 26, sub-s. 1, of the Agricultural Holdings Act, 1923. This is a Consolidation Act, and s. 26, sub-s. 1, replaces similar provisions in the 1919 and 1920 Acts, which I need not consider. No one has been able to tell me the object of these provisions, and it is difficult to appreciate the particular risks against which the Legislature wished to protect the agricultural tenant.

Now s. 26, sub-s. 1, provides as follows. [His Lordship read s. 26, sub-s. 1, and continued:] The defendant points out that the section relates to a contract for sale of the whole "or any part" of a year to year holding. In the present case the notice to quit was given by both sets of reversioners, and, as was essential for its validity, it was a notice to quit the entire holding. Neither set of reversioners could by themselves have given that notice. The concurrence of both was required in order to give the requisite notice as to the entire holding.

The difficulties in the section are numerous, but in the present case I have only to deal with one aspect. After a perfectly valid notice to quit the entire holding given by both sets of reversioners, the reversioners of Whiteacre contracted to sell Whiteacre to the defendant. The sole question is whether that contract nullified the perfectly valid notice to quit the entire holding.

In my view as applied to a contract to sell part of a holding the section provides that on the making of any contract for sale of any part of a holding, held by a tenant from year to year, any then current and unexpired notice to determine the tenancy of the entire holding shall, "if the contract

(1) [1922] 1 K. B. 632, 633, 636.

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for sale of the part is made by the person or persons by whom the notice to quit the entire holding was given," be null and void. I do not see how it is possible to construe the section otherwise, and, if so, it clearly does not apply in the present case. The contract to sell part of the holding was made by the reversioners of that part. It was not made by the persons by whom the notice to quit the entire holding was given, but only by some of them. The section has therefore no application.

There will therefore be a declaration that the tenancy agreement was duly determined, and an order for possession of Blackacre.

The remaining points in the case were then settled by agreement between the parties, on the basis of this decision.

Solicitors: *Gibson & Weldon, for Edward B. Lee, Chatham; Paterson, Candler & Sykes, for Ellis & Ellis, Maidstone.*

G. R. A.

FRIED *v.* ADMINISTRATOR OF GERMAN PROPERTY AND THE CONTROLLER OF THE CLEARING OFFICE.

[1923. F. 1375.]

TOMLIN J. 1925 *May* 21, 22, 26, 29.

War—Enemy Partnership—Partners carrying on Business in Germany—Debts due from British Debtors at Outbreak of War—Subsequent Dissolution of Partnership—Assignment by retiring Partner of Share to continuing Partner—Retiring Partner's Interest in English Debts—Claim by continuing Partner to collect English Debts—Continuing Partner's Change of Nationality—Refusal by German Clearing Office to admit Right to collect—Assignment of Enemy Debt—Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12), *s.* 6, *sub-s.* 1—*Trading with the Enemy Amendment Act*, 1915 (5 *& 6 Geo.* 5, *c.* 79), *s.* 3—*Treaty of Versailles*, 1919, *Part X., Sect. III., Annex to art.* 296, *paras.* 1, 2 *and* 25; *Sect. IV., art.* 297, *para.* (*d*); *Annex to art.* 298, *para.* 3—*Treaty of Peace Orders*, 1919 *to* 1921, *clause I.* (*iii.*), (*iv.*), (*xvi.*) *and* (*xvii.*), (*ccc.*).

Before August, 1914, the plaintiff (who was at that date an Austro-Hungarian national) and R., a German national, were carrying on business in Germany together in a partnership registered under German law. The partnership was due to expire in 1916, but in 1915 by a verbal

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agreement, R. retired; and the plaintiff took over the whole business and all its assets. In due course he procured himself to be registered as sole proprietor.

At the date of dissolution of the partnership between the plaintiff and R., certain debts, which had been owing since August, 1914, were still due to the firm from debtors in Great Britain. On the coming into force of the Treaty of Versailles in 1920, the plaintiff sought to recover these debts by a claim through the German Clearing Office, but his claim was rejected on the ground that he had become a national of the Czecho-Slovakian Republic by virtue of the Treaty of St. Germain-en-Laye. The German Clearing Office however gave him a certificate pursuant to para. 25 of the Annex to art. 296 in Sect. III. of the Treaty of Versailles. In these circumstances the plaintiff claimed to be free to recover the debts for himself:—

Held, (1.) that R. was an enemy within s. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, and the transaction in 1915, whereby under German law the interest of R. in the debts was assigned to the plaintiff, was an assignment of a debt by or on behalf of an enemy within the section; (2.) that accordingly no right or remedy passed in English law to the plaintiff in respect of R.'s interest in the English debts, but this interest remained vested in R. and had therefore become subject to the charge created by cl. I. (xvi.) of the Treaty of Peace Orders, 1919 to 1921; (3.) that therefore the plaintiff was not entitled without the consent of the administrator of German property to collect any part of the moneys representing such interest.

WITNESS ACTION.

The following statement of facts is substantially taken from the judgment of Tomlin J.:—

In August, 1914, at the outbreak of war, the plaintiff, being then a national of the former Austro-Hungarian Empire, and one Rosener, a German national, were carrying on business in partnership together under the name of Fried Hesse & Co. in Germany, being then the only partners in a German firm having its seat in Berlin, and duly registered as a partnership firm in accordance with German law.

The partnership was for a term certain expiring in 1916, and the partners were interested in equal shares. In the early part of 1915, both partners being then resident in Berlin, differences arose between the plaintiff and Rosener. As a result a verbal agreement was entered into between them, whereby Rosener retired and the plaintiff took over the whole business of the partnership and all the assets

thereof. In due course the plaintiff procured himself to be registered as sole proprietor of the business. On August 4, 1914, certain trading debts were due and owing to the said firm by debtors in Great Britain in connection with the business, amounting in all to about 3000*l.*, and those debts were still due and unpaid at the date of the dissolution of the partnership.

On the signing of peace, the plaintiff became by virtue of art. 70 of the Treaty of St. Germain-en-Laye a national of the Czecho-Slovakian Republic, a fact which was fully admitted at the trial and not disputed in any way. After the Treaty of Versailles came into force on January 10, 1920, the plaintiff in the first instance sought to recover the amount of the debts so due to the firm of Fried Hesse & Co. by debtors in Great Britain, by making a claim through the German Clearing Office. The German Clearing Office, however, by reason of the plaintiff being a national of the Republic of Czecho-Slovakia, by a letter dated June 22, 1920, declined to notify the claim to the British Clearing Office, and on June 29, 1920, gave the plaintiff a certificate pursuant to para. 25 of the Annex to art. 296 in Sect. III. of the Treaty of Versailles (1) in the following terms :—

"CERTIFICATE.

Under paragraph 25 of the Annex to article 296 of the Peace Treaty.

The German Clearing Office hereby certifies that Messrs. Fried Hesse & Co. of Berlin may prosecute their claim for 95*l.* 4*s.* 11*d.* in respect of a sale of goods contract against Arthur & Co., Ld., of Glasgow, which was duly notified to

(1) Para. 25 of the Annex to art. 296 in Sect. III., Part X., of the Treaty of Versailles.

"In any case where a Creditor Clearing Office declines to notify a claim to the Debtor Clearing Office, or to take any step provided for in this Annex, intended to make effective in whole or in part a request of which it has received due notice, the enemy creditor shall be entitled to receive from the Clearing Office a certificate setting out the amount of the claim, and shall then be entitled to prosecute the claim before the courts or to take such other proceedings as may be open to him."

TOMLIN J. this office, before the Courts or to take such other proceedings as may be open to them.

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Berlin, the 29th June, 1920.

THE GERMAN CLEARING OFFICE.

"L. S." (Sd.)."

The plaintiff thereupon brought these proceedings, claiming a declaration that he was free to collect all the debts himself. The original defendant was the Administrator of Austrian Property, but, during the trial, the record was amended by substituting the officer who held the posts of Administrator of German Property and Controller of the Clearing Office under the Treaty of Peace Orders.

The plaintiff's claim was resisted by the defendant, first on the ground that one moiety of the debts representing Rosener's original interest therein fell within para. 1 of art. 296 of the Treaty (1), and under that article and the Treaty of Peace Orders, cl. 1 (iv.) (2), was recoverable by and payable to the Controller only; and secondly, in the alternative that such moiety under the circumstances was within the category of property subject to the Treaty charge by virtue of art. 297 and the Treaty of Peace Orders, cl. 1 (xvi.). (2)

(1) Art. 296 to Sect. III. of the Treaty of Peace, 1919:—

"There shall be settled through the intervention of Clearing Offices . . . . the following classes of pecuniary obligations:—

"(1.) Debts payable before the war and due by a national of one of the Contracting Parties, residing within its territory, to a national of an Opposing Power, residing within its territory."

(2) The Treaty of Peace Orders, 1919 to 1921, provide:—

"(1.) (iv.) The Clearing Office shall have power to enforce the payment of any enemy debt against the person by whom the debt is due, together with such interest as is payable under para. 22 of the Annex to the said Sect. III., and for that purpose shall have all such rights and powers as if they were the creditor . . . ."

"(xvi.) All property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force (not being property, rights or interests acquired under any general licence issued by or on behalf of His Majesty), and the net proceeds of their sale, liquidation or other dealings therewith, are hereby charged:—

(*a*) In the first place, with payments of the amounts due in respect of claims by British nationals with regard to their property, rights and interests, including companies and

Gavin T. Simonds K.C. and *Warwick Draper* for the plaintiff. The result of Rosener's retirement in 1915 was to vest his share in the partnership property and assets in the plaintiff, who became therefore the sole proprietor of the business and assets of the firm. Debts due to the firm do not come within para. 1 of art. 296 to Sect. III. of Part X. of the Treaty of Versailles: see para. 2 of the Annex to art. 296 (1), where the expression "enemy debt" is defined. It has the same meaning in clause 2 of the Treaty of Peace Orders, 1919 to 1921. (2)

The plaintiff was at the relevant date a Czecho-Slovakian national, not a German national. Therefore debts due to the firm of which he was proprietor were not "enemy debts." The German Clearing Office rightly took this view, refused to forward his claim under art. 296, and under para. 25 of the Annex to that article, gave him a certificate which entitled him to pursue his remedy, otherwise than through the intervention of the Clearing Offices.

The obligations under art. 296 are reciprocal, providing machinery for the collection of debts. A debt cannot be regarded as an enemy debt within the article unless forwarded as a debt. When the German Clearing Office has refused to forward a claim, and has given its certificate under para. 25, the Controller of the British Clearing Office is not entitled to claim that it is an "enemy debt."

It is alternatively alleged that the plaintiff cannot claim the part of the debt due to the firm representing Rosener's interest, because it falls within s. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914. (3)

associations in which they are interested in German territory, or debts owing to them by German nationals . . . ."

(1) Annex to art. 296 to Sect. III., para. 2, is as follows:—

"In this Annex the pecuniary obligations referred to in the first paragraph of art. 296 are described as 'enemy debts,' the persons from whom the same are due as 'enemy debtors,' the persons to whom they are due as 'enemy creditors'" . . . . .

(2) Clause 2 of the Treaty of Peace Orders, 1919 to 1921, is as follows: "For the purposes of this Order, the expression 'enemy debt' has the meaning assigned to it by para. 2 of the Annex to Sect. III. of Part X. of the Treaty, and includes any sum which under the Treaty is to be treated or dealt with in like manner as an enemy debt."

(3) Trading with the Enemy

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The transaction in 1915, whereby the plaintiff took over the share of Rosener in the assets and debts of the partnership, cannot be an assignment within the meaning of the sub-section. The entire interest in the debts passed to the plaintiff by the operation of the relevant German law, not by virtue of any assignment by Rosener.

[TOMLIN J. It looks rather as if the effect of the sub-section is that the transfer did not carry, so far as English law is concerned, any right of action against the debtors.]

It is submitted that when a partner Rosener could not sue, only the partnership itself could sue for a debt due to the firm. In order to avail himself of the Act, the defendant must prove that the effect of the section of the Act is not only to prevent the transfer of rights to an assignee, but to cause those rights to remain the property of an assignor.

[TOMLIN J. You say then that the transfer does not convey any rights or remedies to the debtor ?]

The section is a penal section; it deals with three separate things. Was there here an "assignment of a debt"? It is clear that where the statute provides that on the retirement of a partner, his share should remain and go to the continuing partner, this is not an assignment within s. 6, sub-s. 1. What the Act aimed at was to prevent, for instance, a German creditor recovering his debt by selling it to a neutral.

[TOMLIN J. There is a distinction between assignment by operation of law in invitum and where a man voluntarily does an act.]

Yes; the real test is whether an assignment can be said

Amendment Act, 1914, s. 6, sub-s. 1:—

"No person shall by virtue of any assignment of any debt or other chose in action, or delivery of any coupon or other security transferable by delivery, or transfer of any other obligation, made or to be made in his favour by or on behalf of an enemy, whether for valuable consideration or otherwise, have any rights or remedies against the person liable to pay, discharge or satisfy the debt, chose in action, security or obligation, unless he proves that the assignment, delivery, or transfer was made by leave of the Board of Trade or was made before the commencement of the present war, and any person who knowingly pays, discharges or satisfies any debt, or chose in action, to which this sub-section applies, shall be deemed to be guilty of the offence of trading with the enemy within the meaning of the principal Act."

to be one by the operation of law or by a voluntary act, such as a person filing his own petition.

[TOMLIN J. It seems to me the test is whether a man has contracted to do certain things in terms, or whether, by operation of law, it has the same result.]

There was no assignment in 1915 on Rosener's retirement within the sub-section.

[TOMLIN J. Again it depends on what is meant by "assignment"; this act of retirement and the plaintiff taking over the debts may amount to one. Certainly as a fact, property passed.]

It is submitted there was no assignment by the act of retirement within the section. If there had been, the effect would be the assignee would have no rights or remedies against the debtor. By German law, Rosener had no right to sue. All the section says is no rights or remedies shall be conferred on the assignee. It is for the defendant to say whether Rosener still can recover. There is a territorial as well as a temporal limitation of this Act.

[TOMLIN J. Is there a definition of the word "enemy"?]

In the preamble to the amending Act of 1914, which definition is extended by s. 3 of the Trading with the Enemy Amendment Act, 1915, the meaning is given. (1)

What the section really lays down is that rights shall not be transferred during the period of the war. It aims at preventing any assistance being given to the enemy during the war; this is borne out by the penalty at the end of the section. It is submitted that the scope of the Trading with the Enemy Amendment Act, 1914, is wholly territorial, and that s. 6 was not aimed at a transaction between two individuals, one of whom was a neutral and the other an alien enemy, where both of them were resident in Berlin and neither of them in England.

(1) Trading with the Enemy Amendment Act, 1915, s. 3:—

"Sections six, seven and eight of the principal Act [Trading with the Enemy Amendment Act, 1914] shall apply as if the expression 'enemy' where used in those sections, included any person or body of persons who is an enemy or treated as an enemy under any proclamations relating to trading with the enemy for the time being in force."

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A. C. Clauson K.C. and *J. H. Stamp* for the defendant. The dissolution of the partnership in 1915 operated (inter alia) as an assignment of certain choses in action. Any act of a party giving rise to a right in A to sue for a chose in action, due from B to A, the party so acting, is an assignment of that chose in action by or on behalf of the party so acting. The act of the party was the agreement of February, 1915 by Rosener with the plaintiff, and under which the plaintiff was to take all the assets of the partnership, and Rosener to fall out altogether. It was clearly an assignment of all the partnership assets, rights and liabilities from Rosener to the plaintiff to the extent of Rosener's interest in the assets, and such assignment includes the debts in question. Therefore s. 6 of the Trading with the Enemy Amendment Act, 1914, applies, and such an assignment is plainly within the sub-section. Assuming the transaction was therefore an assignment of debts, which Rosener was interested in, the plaintiff is not entitled to collect these debts himself. We raise no question regarding art. 296. It is entirely a question within s. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914.

Gavin T. Simonds K.C. in reply. All that the German Administrator of Property is concerned with is the imposition of the charge for German nationals. It is necessary to look at the beneficial interest, and one must look through the hand, who is to receive, to get at the beneficiary. He is determined according to the law of domicil. From the evidence it is clear, the person beneficially interested in this debt is not Rosener, but the plaintiff. Prima facie the beneficiary is to be determined by German law, and the Administrator of German property can have no interest in the matter. He must show that, whatever German law says, the beneficiary was not the plaintiff, but Rosener.

The Treaty of Peace imposed the charge under clause 1 (xvi.) only on beneficial interests.

Another question is, what is the effect of s. 6? It is clearly limited to the period of the war, and has a temporal limitation. The real object was to prevent assistance being

given to Germans during the war by a German not being able to recover his debt from a neutral. This limitation is shown by the preamble to the Act.

Cur. adv. vult.

May 29. TOMLIN J. delivered a written judgment, in which after stating the facts as substantially set out above, he continued: As the result of the evidence of German law which I have heard I find that under German law a partnership firm has no separate legal existence apart from the partners who compose it, and that the assets of the partnership belong to the partners in proportion to their interest in the firm. I further find that the effect of the agreement whereby Rosener retired operated according to German law (there being no provision in the agreement to the contrary) to pass to the plaintiff the ownership of the business, and all the assets thereof, including any debts owing to the firm from its debtors.

The debts owing to the firm included debts amounting in all to about 3000*l.*, owing at the outbreak of the war by debtors in England.

The plaintiff, after the Treaty of Versailles came into force, in the first instance sought to recover these debts by making a claim through the German Clearing Office; but the German Clearing Office, by reason of the plaintiff being a national of the Republic of Czecho-Slovakia, declined to notify the claim to the British Clearing Office, and gave the plaintiff a certificate pursuant to para. 25 of the Annex to art. 296 in Sect. III. of the Treaty of Versailles.

The plaintiff now claims that in the foregoing circumstances he is free to collect the debts himself. The defendant resists the claim, first, on the ground that one moiety of the debts representing Rosener's original interest therein falls within the first head of art. 296 of the Treaty, and under that article and the Treaty of Peace Orders, cl. 1 (iv.), is recoverable by and payable to the Controller only; and secondly, in the alternative, that such moiety in the circumstances is within the category of property subject to

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the Treaty charge, by virtue of art. 297 and the Treaty of Peace Orders, cl. 1 (xvi.).

With regard to the first line of defence I think that the defendant is in a difficulty. Para. 25 of the Annex to art. 296 to Sect. III. of the Treaty provides as follows. [His Lordship read the paragraph of the Annex as set out above and continued:] The British Clearing Office has apparently accepted or at any rate has not complained of the course which the German Clearing Office has taken, or set up that there is any difference between the two Clearing Offices, which ought to be referred to the mixed tribunal or otherwise to arbitration under para. 16 of the same Annex.

The expression "enemy debt" in the Treaty of Peace Orders (see Sect. II.) has the meaning assigned to it by para. 2 of the Annex to art. 296 to Sect. III. of Part X. of the Treaty (that is, it is the term describing the pecuniary obligations referred to in para. 1 of the same art. 296 of the Treaty), and includes any sum which under the Treaty is to be treated or dealt with in like manner as an enemy debt.

In the circumstances which I have indicated I do not think that the defendant is in a position to assert that any part of the debts in question falls within art. 296 or to dispute that (apart from the second line of defence) the plaintiff is entitled to rely on clause I. (iii.) of the Treaty of Peace Orders, 1919 to 1921, which provides that "it shall not be lawful for any person to take proceedings in any Court for the recovery of any enemy debt except in the circumstances provided (inter alia) under paragraph 25 of the Annex to the said Section III." I think therefore this defence fails.

The second line of defence really depends upon the construction of s. 6, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914. [His Lordship read the sub-section.] Then under s. 3 of the Trading with the Enemy Amendment Act, 1915, it is provided that "Sections six, seven, and eight of the principal Act shall apply as if the expression 'enemy,' where used in those sections, included any person or body of persons who is an enemy or treated as an enemy under any

proclamations relating to trading with the enemy for the time being in force."

Now the transaction which took place in 1915 between Rosener and the plaintiff operated according to German law as I hold to assign the interest of Rosener in the debts to the plaintiff. It was a transaction carried out by agreement between the parties with the object of producing that result. Rosener was an enemy within the meaning of the section which I have read, and in my opinion the transaction amounted to an assignment of a debt by or on behalf of an enemy within the meaning of this section.

It was urged that some limitation ought to be placed upon the period within which the effect of the section is to operate. I can see nothing in the language of the section to justify such a limitation, and the possibility of the continued existence of a legislative measure of this kind restricting the right of disposition seems to be contemplated by para. (*d*) of art. 297 in Sect. IV. of the Treaty (1), when read in the light of the definition of "exceptional war measures" contained in para. 3 of the Annex to art. 298 in Sect. IV. of the Treaty. (2)

In my judgment therefore, so far as English law is concerned (and that is the only law at which for this purpose I am entitled to look), no right or remedy passed to the plaintiff by the transaction of 1915 in respect of Rosener's

(1) Art. 297 (*d*) to Sect. IV. of the Treaty of Versailles:—

"As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paras. 1 and 3 of the Annex hereto, shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty."

(2) Art. 298, Annex, para. 3:—

"In art. 297 and this Annex the expression, 'exceptional war measures,' includes measures of all kinds, legislative, administrative, judicial, or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form, or in whatsoever place. . . . ."

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interest in the English debts, and such interest remained in Rosener. Upon this footing, I think that Rosener's interest in the debts falls within the category of "property, rights and interests within His Majesty's Dominions or Protectorates belonging to German nationals at the date when the Treaty comes into force" (that is, January 10, 1920), and therefore is subject to the charge created by clause I. (xvi.) of the Treaty of Peace Orders for the purpose of giving effect to art. 297 of the Treaty of Versailles; and by virtue of clause I. (xvii.) (ccc.) (1) of the Treaty of Peace Orders, is payable to the Administrator of German Property.

There will be a declaration that the share or interest of Rosener in the debts as it subsisted immediately prior to his retirement from the partnership, is subject to the charge created by clause I. (xvi.) of the Treaty of Peace Orders, and that the plaintiff is not free, without the consent of the Administrator of German Property, to collect any part of the moneys representing such share or interest.

The plaintiff must pay the costs of the action.

Solicitors: *Leader, Plunkett, & Leader*; *Solicitor to the Clearing Office.*

(1) By the Treaty of Peace Orders, 1919 to 1921, cl. I. (xvii.), (ccc.), it is provided, "where the property, right or interest subject to the charge, consists of any sum of money due to a German national (not being an enemy debt within the meaning of art. 296 of the Treaty) it shall be payable to the Custodian and shall be paid to him on demand, and the Custodian shall have power to enforce the payment thereof, and for that purpose shall have all such rights and powers as if he were the creditor."

A. R. T.

AGRICULTURAL WHOLESALE SOCIETY, LIMITED *v.* BIDDULPH AND DISTRICT AGRICULTURAL SOCIETY, LIMITED.

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[1923. A. 2261.]

Industrial Society—Rules—Collateral Obligation upon Members to take further Shares—Limitation of Liability—Validity—Industrial and Provident Societies Act, 1893 (56 & 57 *Vict. c.* 39), *ss.* 22, 60.

A collateral obligation imposed by the rules of a society registered under the Industrial and Provident Societies Act, 1893, or by the articles of association of a limited company registered under the Companies (Consolidation) Act, 1908, upon a member of the society or company, which in certain events involves a liability on the part of that member to take further shares in the society or company, can be enforced notwithstanding that the liability of the member to contribute in a winding up is limited by the Act under which the society or company is registered.

The limitation of liability in respect of shares held is distinct from an obligation collaterally imposed upon a member in certain events to take up further shares which will themselves, when taken up, be entitled to a similar limitation of liability. There is nothing in such a collateral obligation which is ultra vires or repugnant to the system of limited liability.

Decision of Lawrence J. reversed.

Dibble v. *Wilts and Somerset Farmers, Ld.* [1923] 1 Ch. 342 overruled.

Appeal from a decision of Lawrence J.

The following statement of facts is taken from the judgment of Pollock M.R. :—

"This is an appeal in an action brought by the Agricultural Wholesale Society, Ld., against the Biddulph and District Agricultural Society, Ld., in respect of a number of shares, 2211, which by the claim it is alleged that the defendant society were bound to take up in the plaintiff society. There is really no dispute upon the important facts. The plaintiff society is registered under the Industrial and Provident Societies Act, 1893, and carries on business as the Central Trading Federation for agricultural co-operative societies of which the defendant society is one. The plaintiff society was registered under the Act with the name of the Farmers Central Trading Board, Ld., on September 14, 1914. By special resolution approved in writing by the

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Chief Registrar of Friendly Societies on July 11, 1918, it changed its name to that which it at present bears. The defendant society is also registered under the Act of 1893 as an industrial society. The defendant society in 1914, before the plaintiffs had changed their name, applied for admission to membership of the plaintiff society and was allotted two shares. The reason why it was allotted two shares was that under the rules of the society, which are registered, the basis on which other societies could become members of the plaintiff society was that they had to take a quota of shares—namely, one share for fifty members of the constituent society. At that time there were in the defendant society some sixty members, and so, in accordance with the rule, the quota of shares that it would have to take, being one for every fifty members or less, would be two, because their members were sixty; and accordingly the defendant society took them.

Now at that date (1914) certain rules were in force. Rule 9 was that 'Each Society or Company which is a member shall hold at least one share for each 50 (or fraction of 50) of its members.' Rule 59 provided a method by which amendment of rules could be effected. Then later (in 1918) there was not only an alteration of the name of the plaintiff society, but there was an alteration of its rules, and, in accordance with the alteration of the rules, which were binding upon the then constituent members of which the defendant society was one, the condition of membership was this: 'Every existing member shall within three calendar months after the 1st June, 1918, take up such a number of shares in the A.W.S. as together with the existing shares of such member in the A.W.S. will make up the number of shares which such society, if a new member, would have had to take up.' And by sub-cl. (*c*) of that r. 6 it was provided that 'Every Allotment Society hereafter admitted to membership'—that is as a new member—'shall take up at least one share of 1*l.* in the A.W.S. for every twenty members in such Allotment Society and additional shares of an amount taken at the par value thereof equal to 2 per cent. on its turnover as below defined.'

In accordance with the amendment of the rule in 1918 as a matter of fact the defendant society took up a total number of shares of 472. That figure was ascertained by applying the standard set out in r. 6 (*c*) to the number of members and the turnover at that time of the defendant society.

Later there was a further amendment of the rules made on June 13, 1922. It followed the lines of the amendment which had been made in 1918, and it required that constituent members should take up a larger number of shares; the actual number which had to be imputed to the defendant society was 2211. That figure was arrived at because of the progress of the defendant society and its success in increasing its turnover. The figures relating to the progress of the defendant society are admitted by it, and those figures show on the part of the defendant society a very remarkable progress. In 1918, at the time when it had to have a quota of 472 shares, its membership was 294, and its turnover was 29,879*l.* In 1920 the membership had risen to 501 and the turnover was not less than 126,362*l.*; and again in 1921 there was a very considerable, though not quite so large a turnover. The original rules and the successive rules of 1918 and 1922 were all based upon this, that the quota of shares which were to be held by constituent members of the society were to be quantified according to the progress and success of the constituent societies. The result was that by a notice which was sent to the defendant society on October 11, 1923, the plaintiff society notified the defendant society that by a resolution of the board meeting of the plaintiff society held on the same day the plaintiff society had allotted to the defendant society these 2211 shares of 1*l.* each. It is not disputed that that figure is rightly ascertained in accordance with the system laid down by the rules upon the basis of the membership of the defendant society and its turnover. The defendant society has refused to take up those shares or to pay for them: the society says that the system under which its liability accrues to take the shares is one which is repugnant to the system of limited liability, and it declines to accede to the demand to take up the shares.

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Accordingly, on October 18, a week after that notification, the writ was issued in this action. The action came on for trial before Lawrence J. on May 29, 1924, when he gave judgment for the defendants upon the claim, and upon the counter-claim he acceded to their prayer that there should be a rectification of the register of members of the plaintiff society by removing the name of the defendants in respect of their holding of these 2211 shares. Afterwards, on June 29, 1924, an order was made to wind up the plaintiff society; but for present purposes that does not alter the rights of the parties.

The defendants decline to take up these 2211 shares, as they say that under s. 60 of the Act of 1893 the liability of members in a registered industrial society is limited, for by s. 60 (*d*) of that Act it is provided that no contribution shall be required from any individual society or company exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member; and the defendants successfully maintained before Lawrence J. that this system under which there has been an accretion to the number of shares which they originally took up is a system which is repugnant to the system of limited liability, or indeed I think the phrase was used that in attempting to impose this liability upon the defendant society the plaintiffs were acting ultra vires."

Lawrence J., following his own decision in *Dibble* v. *Wilts and Somerset Farmers, Ld.* (1), dismissed the action.

The plaintiff society appealed. The appeal was heard on April 21, 22 and 23, 1925.

W. A. Greene K.C. and *Holmes* for the appellants. The appellants' claim is based on two grounds, first, that an obligation to take the 2211 shares in question arose under their rules, and secondly, that there was a contract to take them quite apart from the rules. If we succeed on the first claim, the other will not arise.

Lawrence J., following his own decision in *Dibble's* case (1),

(1) [1923] 1 Ch. 342.

held that the particular rule in question being incompatible with the conception of limited liability was ultra vires, and he dismissed the action. He relied on three cases—namely, *Ooregum Gold Mining Co. of India* v. *Roper* (1); *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (2); and *Manners* v. *St. Davids Gold and Copper Mines, Ld.* (3)—but they are all distinguishable from the present case. In the *Ooregum* case (1) it was proposed to issue shares at a discount, and so impose on the shareholder a less liability than that provided by the Act. In *Bisgood's* case (2) it was sought to impose a liability upon the shareholder in excess of the liability on his shares, or else to forfeit them; and in *Manners'* case (3) a shareholder was to be compelled to give up his fully paid shares and submit to receive something with a liability attached to it. In each of those cases the transaction was held to be void because it transgressed the limitation of liability under the Companies Act, but in the present case there is no sinning against the fundamental principle of limited liability. There is a collateral agreement to take further shares, which in itself is unobjectionable, and the principle of limited liability will apply to those shares when taken.

[SARGANT L.J. In Palmer's Company Precedents, 10th ed., Part I., there is a form (No. 22) for insertion in the memorandum of association providing that subscribers of founders' shares shall accept an allotment of ordinary shares if a specified number of ordinary shares shall not be taken up before a certain date. I have never heard any doubt cast on the validity of that.]

The liability of the members must be defined by the memorandum, but the articles can extend the liability of members so long as creditors are not prejudiced in a way inconsistent with the memorandum: Buckley on the Companies Act, 10th ed., p. 7.

[POLLOCK M.R. I have never heard an objection raised in cases of mutual marine insurance.]

(1) [1892] A. C. 125. (2) [1908] 1 Ch. 743.
(3) [1904] 2 Ch. 593.

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In both *Lion Mutual Marine Insurance Association, Ld.* v. *Tucker* (1) and *In re Bangor and North Wales Mutual Marine Protection Association; Baird's Case* (2) the members were liable in respect of a collateral liability arising out of the articles of association, over and above the guarantee fixed by the memorandum. A member in such a case who is called upon to pay money in respect of the collateral liability is not contributing in respect of his shares to the assets of the company in a winding-up, but is paying for a benefit which he has agreed to take and which is a totally distinct transaction. In those cases the collateral bargain was to insure his ship; in the present case, it was to take and pay for shares. There is nothing wrong in a company issuing shares on the condition that if the company wants more money those shareholders will take up more shares or lend money to the company, as in *Peninsular Co., Ld.* v. *Fleming.* (3)

The rules of this society were binding on the members by virtue of s. 22 of the Industrial and Provident Societies Act, 1893, just as in the corresponding s. 14 of the Companies (Consolidation) Act, 1908, the articles of association of a company are binding on its members: *Hickman* v. *Kent or Romney Marsh Sheep-breeders' Association.* (4) In *McEllistrim* v. *Ballymacelligot Co-operative Agricultural and Dairy Society* (5) there would have been a very short answer if the contract in that case could not have been enforced by the society which was registered under the very same Act, but the House of Lords must have regarded the rules and contracts under them as enforceable by the society had it not been that they were bad as being in restraint of trade.

There is nothing ultra vires about this collateral agreement.

Cunliffe K.C. and *Buckmaster* for the respondent society. The question is whether a company or an industrial society can by its rules require shareholders by reason of their shareholding to take up further shares. A limited company or an industrial society may be grouped together, because it is

(1) (1883) 12 Q. B. D. 176.
(2) [1899] 2 Ch. 593.
(3) (1872) 27 L. T. 93.
(4) [1915] 1 Ch. 881.
(5) [1919] A. C. 548.

clear from the history of the legislation relating to them that the Legislature intended the members of both to be on the same footing.

Under s. 11 of the Industrial and Provident Societies Act, 1852, the liability of members was not restricted. The Companies Act, 1862, and the Industrial and Provident Societies Act, 1862, were passed on the same day and printed together, and s. 8 of both Acts prescribes the requisites for the limitation of liability of the members. Sect. 5, sub-s. 5, of the Industrial and Provident Societies Act, 1893, and s. 3, sub-s. 1 (i.), of the Companies (Consolidation) Act, 1908, both provide for the use of the word "limited." For the purposes of this case, the limitation of the liability of a member of either body is not different. In *Fountain's Case* (1) the society was treated like a company under the Act of 1862, and the members were held not liable beyond the limited liability.

A man who takes a share in this society may be involved in a liability which is not only not ascertained then but may never be ascertained in his lifetime, for the society may pass a rule that members must take further shares, and may have a rule which makes it impossible for a shareholder to dispossess himself of his shares, and so from time to time may call on him to take further shares. If this can be done it strikes at the root of the limited liability of the individual. He is called on to take the further shares by reason of his liability on, or holding of, the original shares.

This is a different case from that of the holder of founders' shares, who agrees to take certain ordinary shares in a specified event, for he knows the full extent of his liability. Moreover Form 22, in Palmer's Company Precedents, 10th ed., has never received any judicial approval. The objects of the Companies Acts were to limit the liability of the company and of its members, and to limit the creditors to the assets of the company and its uncalled capital. But in the present case the liability of the shareholders cannot be limited because of this rule. The obligations of the respondent society must

(1) (1865) 4 D. J. & S. 699.

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stand or fall by the obligations it undertook on becoming a shareholder in 1914, which are the foundation of the whole question.

A shareholder cannot be made liable beyond the nominal amount of the shares held by him, and his real liability is incurred when he becomes a shareholder, and then if any further liability is put upon him, that is ultra vires—"any attempt so to define the constitution of the company as that the member shall in an event be liable for a larger sum is in breach of the statute and is ultra vires. Any clauses which can be used to maintain a scheme which imposes upon the member the alternative of accepting liability for a larger sum or of being dispossessed of his status as shareholder upon terms which he is not bound to accept are, I think, ultra vires": per Buckley L.J. in *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (1), and no article, rule or resolution can dispense with that condition: per Lord Macnaghten in *Ooregum Gold Mining Co. of India* v. *Roper* (2); *Manners* v. *St. Davids Gold and Copper Mines, Ld.* (3); *Dibble* v. *Wilts and Somerset Farmers, Ld.* (4) "Under the Industrial and Provident Societies Act, 1893, I think there is no question that the liability of the members is governed by the nominal amount of the shares in respect of which they become members of the society": per Neville J. in *In re United Service Share Purchase Society, Ld.* (5)

This is an attack by the appellants against the respondents for a contribution to the funds of their society, not on behalf of the other shareholders as in the *Lion Insurance* case (6), but in respect of further shares allotted to the respondents, and the money for those shares goes to the plaintiff society and confers no benefit on the respondents or the other shareholders, except in the matter of dividends; and *Baird's Case* (7) and *Peninsular Co., Ld.* v. *Fleming* (8) show quite clearly that a shareholder can only be attacked as a creditor,

(1) [1908] 1 Ch. 743, 759.
(2) [1892] A. C. 125, 145.
(3) [1904] 2 Ch. 593.
(4) [1923] 1 Ch. 342.
(5) [1909] 2 Ch. 526, 534.
(6) 12 Q. B. D. 176.
(7) [1899] 2 Ch. 593.
(8) 27 L. T. 93.

not as a contributory, and are fundamentally distinct from this case.

W. A. Greene K.C. in reply. The marine insurance cases are important, because they were instances where the liability arose under the memorandum and articles of association alone; and this appears clearly from *United Kingdom Mutual Steamship Assurance Association, Ld.* v. *Nevill.* (1) The status of membership contains a fasciculus of obligations and rights between the parties, but further obligations may be introduced so long as they do not offend the statute. There is no authority which shows that an obligation to take further shares may not be so introduced.

I ask for a declaration that under or by virtue of an agreement under r. 6 of 1918 and in the events which have happened the defendants became and were at the date of the issue of the writ in this action liable to take 2211 shares of 1*l.* each in the plaintiff society, and that the name of the defendant society was rightly entered in the plaintiff society's books as the holder of those shares.

POLLOCK M.R. This appeal raises an important point; it is in effect an appeal not only from the judgment in this particular case which was given on May 29, 1924, by Lawrence J., but also from a decision of the same judge in the case of *Dibble* v. *Wilts and Somerset Farmers, Ld.* (2) Upon the point which is now brought before this Court in the present case, Lawrence J. felt that he was bound by his decision given in *Dibble* v. *Wilts and Somerset Farmers, Ld.* (2), and he thereupon decided the present case in accordance with his decision in the earlier case. The two cases, therefore, come before this Court now for the first time for review. [His Lordship then stated the facts above set out and continued:] Lawrence J. came to his conclusion upon substantially three decisions. One was the well known case of the *Ooregum Gold Mining Co. of India, Ld.* v. *Roper* (3), where it was held that a company has no power to issue shares

(1) (1887) 19 Q. B. D. 110. (2) [1923] 1 Ch. 342.
(3) [1892] A. C. 125.

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as fully paid up for a money consideration less than their nominal amount, i.e., it has no power to issue shares at a discount. The next case was a case of *Bisgood* v. *Henderson's Transvaal Estates, Ld.* (1), in which there was an attempted sale of the shares of a company to a new company with a responsibility attached in that sale to the shareholders in the old company that they should make a further contribution in respect of their shares, or should forfeit their shares. It was held that such a scheme was ultra vires and bad. The third case was one of *Manners* v. *St. Davids Gold and Copper Mines, Ld.* (2), in which again a plan was in contemplation the effect of which was to compel shareholders to contribute further capital than the extent of their liability on the shares which they held, and that in consequence of its imposing a fresh and further liability upon that which was limited on the shares, it was held that the system was one which could not be enforced. Put shortly, Romer L.J. (3) says of the scheme: "It is a scheme whereby the shareholders of a company who have paid up their shares in full and are not under any liability to furnish any further capital are told, 'You must pay up more capital, and if you do not you shall forfeit all share and interest in this company as a going concern.' Such a scheme is wholly improper and ultra vires." Those three decisions were the decisions mainly relied upon by Lawrence J. in coming to his conclusion.

After listening to the helpful argument on both sides, I have come to the conclusion that the principle of those cases does not apply to the present case. But Mr. Cunliffe has argued with great force that inasmuch as the liability of the members of an industrial society is limited, this system, which might be characterized as a snowball system, whereby the holding of a particular number of shares, in certain events and in the development of a constituent society, involves the taking up of further shares, is in itself a system which involves an uncertain and increased liability beyond the liability originally contemplated when the shareholders first

(1) [1908] 1 Ch. 743. (2) [1904] 2 Ch. 593.
(3) [1904] 2 Ch. 593, 606.

took up their shares; and he bases his argument upon the close analogy, if not similarity, of the societies to a company under the Companies (Consolidation) Act of 1908. But although that analogy is close in many points, the similarity is not exact, and I think it is of some importance to remember that we are dealing with an industrial society which is formed for a purpose somewhat different from that under which an adventure is brought under the Companies (Consolidation) Act of 1908. Mr. Cunliffe has called our attention to the first statute, which was passed for the purpose of giving industrial and provident societies an independent character apart from that of friendly societies under which they had been up to that time carried on. In 1852 there was passed an Act to legalize the formation of industrial and provident societies per se apart from friendly societies. Now those societies, as recited in the preamble, are of this nature: "Whereas various associations of working men have been formed for the relief, maintenance, education, and endowment of the members, their husbands, wives, children, or kindred, and for procuring to them food, lodging, clothing, and other necessaries, by exercising or carrying on in common their respective trades or handicrafts"; and so on, then the Act is passed for the purpose of enabling them to carry on and to exercise in common, labour, trades or handicrafts, the whole basis of it being that it is a mutual trading society. There are some characteristics of a society which are quite different from the ordinary company. For instance, by s. 24 of the Act of 1893, it is contemplated that the number of shares of a society shall not be limited, as they are in the case of a company under the Companies Act, and not fixed in number; and it is also contemplated that the society may sell only mutually among its members, though it is contemplated that it may possibly carry on business with persons who are not members. But in principle the original idea was that of mutual trading. In the Act of 1852 there was no limit of liability, the system of limiting liability not then having been generally recognized; and by s. 11 the liability of members was not to be restricted.

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The next Act which was passed was one in 1862. We are told as a matter of history that the Companies Act of 1862 and the Industrial Societies Act of 1862 both received the royal assent on the same day, and they both contain a limitation of liability. Afterwards there was another Act of 1876, and all the previous Acts have been repealed by the Act now in force, which is the Act of 1893. Now under the Act of 1893, in the case of a registered society the liability of members in winding up is limited to the amount unpaid on their shares, and it is said that no liability ought to be imposed upon a member of the plaintiff society beyond the limit of the shares actually held at the time. The principle of limitation of liability which no one would wish to question or impair is, if I may respectfully say so, admirably stated in a case which was cited to us by Mr. Cunliffe, where Buckley L.J. in *Bisgood's* case (1) says this: "In the matter of liability upon his shares the statute"—that is the Companies Act—"provides in plain terms by s. 38, sub-s. 4, that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount unpaid on his shares." He is careful in that sentence to state his proposition in relation to the shares which a shareholder holds in the company. But there may be liabilities which a shareholder may incur which are not within that prohibition.

As an illustration of that, one may turn to the case of *Lion Mutual Marine Insurance Association, Ld.* v. *Tucker*. (2) That was a mutual marine insurance association in which the liability of members upon their shares was limited to 5*l*., and the purpose of having shares and a contribution of money to the association, which was a limited association, was that there should be sufficient funds to carry on at the central office the business of the association, and to apportion the liability of members and deal generally with the business; but the main purpose for which persons joined that association was that they should effect mutual insurance of each other's vessels, and each member of the association, if and when a

(1) [1908] 1 Ch. 743, 759. (2) 12 Q. B. D. 176.

loss occurred to a particular member, had to pay up rateably his proportion of the loss. The advantage which he gained was that in the event of his losing his own vessel, the other members would pay him their contributions to make good his loss. If he was fortunate in escaping loss, he had to pay what was in the nature of a premium as his contribution to the losses of the other members. But the moneys that were paid were collected by the association for the purpose of being handed over to the unfortunate member who had lost his ship. It was held in the Court below that there was a limit of liability of the members to the 5*l.* share and no more, but it was held in the Court of Appeal that it might well be that although there was a limit on the amount of the share, the liability which was undertaken by the shareholder in becoming a member of the company was one under which he had to pay his rateable proportion of the losses, in addition to paying up the actual quantum of the share in respect of which his liability was limited by the statute. That is one illustration of an additional liability which belongs to a shareholder as such.

There is another illustration which is to be found in the case of the *Peninsular Co., Ld.* v. *Fleming.* (1) In that case the members had undertaken to contribute a proportion in addition to their shares if and when it should be necessary to provide the company with increased funds. It was held that this mode of raising contributions from the shareholders by way of loan was not improper and was not illegal within the Companies Act. That is another case therefore where the shareholder's liability upon his shares was limited, but there was in that limitation of liability no prohibition against the shareholder undertaking a further responsibility entered into to the advantage of the company, and the effect and differentiation between the contribution to which the member is liable upon his shares and what I may call an extrinsic liability, is well put in *Baird's Case* (2): "a member is only liable to be placed on the list of contributories in respect of

(1) 27 L. T. 93. (2) [1899] 2 Ch. 593.

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the amount which by the memorandum of association of the company he has undertaken to contribute in the event of its being wound up" upon his guarantee—it was a company limited by guarantee—"although he may be sued for sums which he is only bound to pay under the articles of association, he is not liable as a contributory in respect of such sums." There are two different liabilities; so far as he is a shareholder he is placed upon the list of contributories in respect of the unpaid balance due upon his shares; in so far as he has undertaken an extrinsic liability, he can be sued in respect of that extrinsic liability.

Now what is the nature of the present liability of the defendants? Is it one which is limited and which cannot be enlarged, in respect of which there is a prohibition against its enlargement by virtue of s. 60 (*d*) of the Industrial and Provident Societies Act, 1893, or is the nature of the liability one which is extrinsic and in respect of which he can be sued in accordance with the distinction pointed out in *Baird's Case?* (1) Whether we look at the defendants at the time when they took their first two shares in 1914, or in 1918 when they took up their 472 shares, or at the later date, in 1922, when the liability became 2211 shares, it is plain that under the rules the number of shares which as a minimum the defendants were bound to hold was fixed by certain characteristics of their own. It depended in the first place upon the number of members of the defendant society, in the second place on the number of members plus their turnover, and in the third place—a different standard being applied—upon the number of members and their turnover; and throughout, the rules being binding upon the defendants, they have contracted with the plaintiff society that the nature of their association with that society is to be such as will be determined by the characteristics which they themselves enjoy. Greater prosperity brings them greater responsibility in the matter of taking up shares. But the contract which they have made is one which intrinsically involves them in an agreement on their part that they shall successively take

(1) [1899] 2 Ch. 593.

up the shares which are to be ascertained from time to time after the termination of their financial period when the turnover can be ascertained and the number of members is known. In respect of each of those shares which they shall take up their liability is directly and clearly limited. But the contract which they have made is one which is not to unfix the liability upon the shares, but is to determine that the quantum of shares which they shall hold shall vary, or at least, be increased by their success. If one regards the society as a mutual concern, the whole basis being one of mutuality, it does not seem inappropriate that such a rule should be put in force. In endeavouring to escape liability by arguing that the liability upon their shares is limited it appears to me that they do not meet the real point, which is the basis of their liability—namely, that by their original adherence to the society, by originally becoming a member of the plaintiff society, they have definitely agreed that one of the characteristics of their membership shall be that there shall be a liability, increasing according to their own prosperity, to take up a certain number of shares, although those shares themselves are to be limited in amount and to carry a limited liability against the defendants.

Similarity to the case of the *Lion Mutual Marine Insurance Association, Ld.* v. *Tucker* (1) is to my mind more complete than is the applicability of the principle which is drawn from the *Ooregum* case (2), or *Bisgood's* case (3), or *Manner's* case. (4) What we have to consider here is not whether upon the shares which are held by the defendant society they are to be asked to contribute more than the face value; what we have to determine is whether or not the nature of the contract which the defendants have made, by which they have agreed that their holding shall be quantified according to certain standards and characteristics of their own from time to time, is one which stands good. For my part I do not see that there is any prohibition against such a contract being made, and having

(1) 12 Q. B. D. 176.
(2) [1892] A. C. 125.
(3) [1908] 1 Ch. 743.
(4) [1904] 2 Ch. 593.

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regard to the terms and nature of the society, it appears to me to be one which is good.

For these reasons I think that the judgment of Lawrence J. ought to be reversed, and an order in the terms, or nearly in the terms, suggested by Mr. Greene will be the appropriate order which should be made by this Court.

WARRINGTON L.J. I am of the same opinion. The plaintiff society is a society registered under the Industrial and Provident Societies Act, 1893. It is a society the constituent members of which are exclusively also industrial and provident societies registered under the same Act. The defendant society is one of such constituent members. The question which has to be determined is whether the defendant society is under a valid and enforceable obligation, purported to be imposed upon it by the rules of the plaintiff society, to take and pay for certain shares in the plaintiff society additional to the shares already held by it. The defendants contend, and Lawrence J., following a decision of his own in *Dibble* v. *Wilts and Somerset Farmers, Ld.* (1), has decided that the imposition of such an obligation as that which it is sought to enforce is prohibited by the Act under which the plaintiff society is registered and is therefore void and not binding upon the defendant society. The question is whether that decision is correct, and if we come to the conclusion that it is incorrect, in allowing the appeal in the present case we, of course, overrule the decision in *Dibble's* case. (1)

The first question is, was the obligation which it is sought to enforce an obligation imposed upon the defendant society, and one which, unless it is void, as Lawrence J. has held, can be enforced by action against the defendant society at the suit of the plaintiffs? The obligation is found in the rules which were in force at all material times. The rules were amended rules; they were amended in the year 1918, and duly registered. The plaintiff society's constituent members, as I have said, are exclusively similar societies, and the rules provide that such constituent members shall take up shares,

(1) [1923] 1 Ch. 342.

the numbers of which are determined first by the number of the members of such constituent society, and secondly, by the amount of its turnover. On that footing the defendant society became a shareholder in respect of 472 shares. Later on, its membership and its turnover increased, and thereupon there came into force a rule of the plaintiff society which is the one giving rise to the obligation now in question: "Every such society or company"—that is every constituent society or company—"shall within six months after the end of each financial year of such society or company apply for and take up such further shares as shall represent any increase in membership and turnover over that on which its then present holding of shares shall have been calculated." Now there is no dispute that in the events which have happened, if that rule is valid and binding, the defendant society became liable to apply for and take up 2211 further shares.

We now come to consider whether the obligation is in fact imposed, leaving for the moment the question whether it is valid and binding. On that question I can have no doubt at all. Sect. 22 of the Act provides this: "The rules of a registered society shall bind the society and all members thereof and all persons claiming through them respectively to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were contained in such rules a covenant on the part of such member, his heirs, executors, administrators and assigns, to conform thereto, subject to the provisions of this Act." There is a very useful summary of the law relating to the question whether as between members and the society or limited company a contractual obligation is imposed by the rules, to be found in the judgment of Astbury J. in *Hickman's* case (1), and as the result of that review I think it is plain on the authorities that such an obligation as that with which we have to deal is one which is a contractual obligation binding the members and capable of being enforced at the suit of the society or company.

I think the same conclusion is really to be drawn—

(1) [1915] 1 Ch. 881.

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inferentially only of course—from *McEllistrim's* case (1) in the House of Lords. There, an obligation was imposed by the rules of a similar provident society upon the members thereof to sell the milk produced by them exclusively to the creameries of the society in question, and that obligation was held by the House of Lords to be void as being in restraint of trade; but it was assumed throughout, and I am quite sure deliberately assumed, that, but for the particular objection in point of law taken to the particular obligation, such an obligation was one which could have been enforced at the suit of the society. So far, then, I think the case is plain.

There remains the question whether there is anything in the Act of 1893 which prohibits, and therefore makes void, an obligation on the part of a member of such a society as this to apply for and take up in certain events a number of shares additional to those of which he is at the time a holder. Now what is said is this: the Act confers upon its members a limitation of liability in terms almost identical with those in which a similar limitation of liability is conferred upon shareholders in an ordinary limited company. The provision is found in s. 60 of the Act, and in effect it is this, that no contribution shall be required from any individual, society or company exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member of the society in question; that is to say, that no contribution shall be required to the debts and liabilities, or to the expenses of the winding up, in the winding up of such a society. We are perfectly familiar with that in the case of limited companies; it limits the liability of a shareholder in respect of shares held by him to the amount unpaid on those shares. But does it do anything more? It seems to me, with all respect to the judgment of Lawrence J. and to the arguments which have been addressed to us, that that judgment and those arguments ignore the obvious distinction between the limitation of liability in respect of shares held, and an obligation collaterally imposed upon a member to take up further shares which will themselves, when taken up,

(1) [1919] A. C. 548.

be entitled to a similar limitation of liability. The learned judge seems to think that the distinction is merely one of form. He says in *Dibble's* case (1): "It is true that in the present case it is not sought to make a member liable to pay more than the nominal amount of any shares which he may for the time being hold, but what is sought to be done is to make him acquire further shares; the effect, however, is the same in both cases and the difference is only one of form." Now with all respect to the learned judge, it seems to me quite plain, and I think there are cases to which I will refer presently which support that view, that the difference is not one in form at all, but it is a difference in substance, and for this reason: what the Act prohibits is the exaction from a member, present or past, as a contribution in the case of a winding up of more than the amount unpaid in respect of his shares as such member. Now supposing this member in question had taken up the shares which by the rules it was bound to take up; it would have been entitled to that limit, it would still have been liable only as a present member to contribute to the debts and liabilities to the extent of the amount unpaid in respect of its shares. The obligation which it is sought to enforce here is not an obligation binding the defendant society to pay more than that statutory limit, but it is a collateral obligation binding it to the plaintiff society to become the owner of further shares in respect of which it may be called upon to contribute and in respect of which contributions it will be entitled to the same limit as it was entitled to in respect of its former shares.

That there can be such a collateral obligation, imposing a further liability upon the shareholder beyond his liability to contribute in the case of winding up, and imposing an obligation which may be enforced, not in the winding up by way of contribution, but by action brought for the purpose of enforcing it, is shown, I think, by the mutual marine insurance cases to which we have been referred. They are the two cases of *Lion Mutual Marine Insurance Association, Ld.* v. *Tucker* (2) and *Baird's Case.* (3) *Baird's Case* (3) is

(1) [1923] 1 Ch. 342, 358. (2) 12 Q. B. D. 176. (3) [1899] 2 Ch. 593.

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particularly striking, because in that case there was a concise judgment by Wright J. in which he points out the difference between contributions in the winding up and a liability which may be enforced by action. And in both of those cases it was held that a liability on the part of a member of a mutual insurance company imposed in each case by the articles of association to contribute to losses on vessels insured by the society, was one which could be enforced by action against the member, and was valid and binding; and in each of those cases it is important to remember that the obligation which was sought to be enforced was one which was imposed upon the person in question as a member of the society and by the regulations of the society.

In my opinion those cases are authorities for the proposition that a collateral obligation imposed by the rules upon a member which involves a liability on the part of that member, is one which can be enforced, notwithstanding that the liability of the member to contribute to a winding up is limited by the Act under which the company to which he belongs was incorporated, and I can find nothing in the Industrial and Provident Societies Act, 1893, which prohibits the undertaking by a member of any such collateral obligation, any more than one can find such a prohibition in the Companies Acts.

The learned judge relies upon three cases: the *Ooregum* case (1); *Bisgood's* case (2); and *Manner's* case (3); and in each case he relies principally upon expressions used by learned judges in respect of the particular question raised in that case, but gives to those expressions meanings which literally and grammatically they may bear, but which certainly, when you look at the contents, the learned judges who used them did not intend them to bear. It is, I am afraid, a misuse of authorities with which we are too familiar. The judgments of learned judges are to be read, and read only, in connection with the facts and the points with which they are dealing, and unless some expressions are used which show that the

(1) [1892] A. C. 125. (2) [1908] 1 Ch. 743.
(3) [1904] 2 Ch. 593.

learned judge pronouncing judgment intended to go further, his judgment ought to be read as confined to the facts and circumstances with which he was dealing. Those cases, when they are examined, in my opinion do not touch the point with which we have to deal at all, because in each of those cases the scheme which was sought to be enforced and the validity of which came in question, directly affected the position of shareholders in reference to the limit of liability imposed by the Companies Acts. In the *Ooregum* case (1) it has been sought to impose upon the shareholder a smaller liability than that which he would have been under by the Act, because it was sought to issue shares at a discount. In the other two cases it was an attempt to impose upon the shareholder a larger liability than that under which he would have been under the Act. In each case it was held to be void, as directly conflicting with the limitation of liability given by the Companies Act then in question.

In my opinion the judgments of the learned judge in *Dibble's* case (2) and in the present case were incorrect. The latter must be reversed and the former must be treated as overruled, and I think the relief asked for by Mr. Greene is substantially that to which the plaintiffs are entitled.

SARGANT L.J. I am of the same opinion, and I will limit my remarks as much as possible, in view of the exhaustive judgments already delivered. The action is one in effect for specific performance of an alleged agreement to take 2211 1*l.* shares of the plaintiff society. The action was founded upon alternative grounds: first, that an obligation to take the shares arose by virtue of the rules of the plaintiff society, and secondly, that it was a contract to take them, altogether apart from the rules.

As regards the second alternative cause of action, I think it unnecessary to say anything, having regard to the fact that I consider the plaintiffs have established their cause of action on the first ground; but I am by no means certain that, in view of all the circumstances which must be considered, the

(1) [1892] A. C. 125. (2) [1923] 1 Ch. 342.

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application that was made for the 472 additional shares was made upon the terms of the form of application that was sent to the defendant society. The form of application filled up and signed cannot be found, if it was filled up and signed; and it is quite possible that the application for the shares was made by virtue of the already existing obligation to take up further shares, and was not an application which contained those additional words which are to be found in the form of application that was sent to the defendants to be filled up.

As regards the first alternative cause of action, it is necessary to consider initially whether the rules of the society in this case did constitute, or did purport to constitute, a contract enforceable amongst the members inter se, and by the society against any of the members. On that point there is a useful summary of the cases in Astbury J.'s decision in *Hickman's* case (1), and the cases are also collected in Buckley on the Companies Acts. I do not think I need do more with regard to this than to say that on a consideration of those cases this case appears to me to be amply covered by the authorities which have held that there is a contract subsisting between the members themselves and the society. It is undoubtedly a contract governing the mutual relations, or purporting to govern the mutual relations of the members of the society and the society itself, and accordingly is a quite different class of contract from that which the Courts refused to enforce in such a case as *Eley* v. *Positive Government Security Life Assurance Co., Ld.* (2)

Therefore I start with this, that on the language of the rules, and on their true interpretation, there is an attempt to give a right to the plaintiff society to call on the constituent societies to take up further shares in proportion to the number of members of the constituent societies and the amount of the turnover of those societies. Now that being so, is there any valid legal objection to such a contract? The argument for the defendants is based on this, that to allow such a contract to be enforced by virtue of the obligations

(1) [1915] 1 Ch. 581. (2) (1875) 1 Ex. D. 20, 88.

inherent to the holding of shares in the society, would be inconsistent with the provisions of the Act of 1893, which are similar for all material purposes to the provisions of the Acts relating to limited companies, that is, inconsistent with the provisions limiting the liability of the members as contributors to the company, and if so inconsistent, necessarily repugnant and void.

For the purpose of considering whether that is so, I think it is material to consider what is the liability which is limited. Prima facie, of course, any person a member of such a society as this, would be liable to the full extent for all the engagements, the debts and liabilities of the company or society of which he was a member. The Act proceeds to limit that liability by s. 60, and the language of s. 60 is this: "Where a registered society is wound up in pursuance of an order or resolution the liability of a present or past member of the society to contribute for payment of the debts and liabilities of the society, the expenses of winding up, and the adjustment of the rights of contributories amongst themselves, shall be qualified as follows"; and then under sub-head (*d*): "No contribution shall be required from any individual, society, or company exceeding the amount, if any, unpaid on the shares in respect of which he or it is liable as a past or present member." That is a limitation of the liability already defined by the earlier words of the section—namely, the liability to contribute for payment of the debts and liabilities of the society in the winding up. Those words do not seem to me in any way to limit or affect the liability of a member of the society otherwise than in respect of his general liability as a member of that society to discharge the general liabilities of the society. The section does not seem to touch any collateral liability of the members, whether arising under the articles of association, or otherwise in respect of some other matter. It is a mere limitation of the general liability attaching to a member of a society, as such member, to discharge the general liabilities of the society, and therefore, in my judgment, that section has no effect at all upon a collateral bargain under which a member agrees to take up further

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shares of the company in proportion to the turnover and the number of members of that constituent member.

There is ample authority for that position. There is authority with regard to the similar legislation as to limited companies. There are the two authorities which have already been referred to by my Lord and Warrington L.J., the authority of the *Lion Insurance Co.'s* case (1) and the authority of *Baird's Case* (2), which point out quite distinctly that the collateral liability under a special bargain and the articles may exist together with the general liability in a winding up, and that as regards that additional liability, there is no limitation at all imposed by the terms of the Companies Acts. An even stronger and I think a more direct case to that effect is the case of the *Peninsular Co., Ld.* v. *Fleming* (3), in which there was by the articles of association imposed on the members of the company in respect of each share of 100*l.* held by them, a liability to lend the company a further sum of 200*l.*—a liability doubling the amount of the liability of the member in respect of his share. But it was held that such a provision was perfectly good and was not prohibited by the Companies Acts. And I think too I ought to refer, as being of considerable interest and some authority, to the fact that in the best known set of Company Precedents, Sir Francis Palmer's Precedents, there has been in several editions—I am referring now to the 11th edition, but it certainly appeared in one or two previous editions—a form No. 22 with regard to founder's shares, a form which provided in the memorandum that each founder should take up a certain proportion—I think 500*l.* in the case in question—of the ordinary shares of the company in addition to the founder's shares for which he subscribed; and the learned author does not appear to have entertained any doubt, and I have never heard any doubt expressed, as to the validity of such a bargain. I think it was a form which was used to a considerable extent some thirty years ago. That being so, it seems to me that on the analogy of the decisions in the cases with reference

(1) 12 Q. B. D. 176. (2) [1899] 2 Ch. 593.
(3) 27 L. T. 93.

to limited companies, there is quite conclusive authority for the view that the limitation of the general liability of a member of a company or society to a definite amount in respect of the general engagements of the company, is not in the least incompatible with there being a subsisting collateral liability cast upon the members of such a company or society by virtue of a special bargain in the articles of association.

That being so, it is necessary to consider whether the cases that were relied on by the learned judge in his own decision, which he followed in the present case, really in any way conflict with that view. I have carefully considered those cases, and it appears to me that they really deal with a different subject matter, and do not in any way negative or cast doubt on the principles to which I have referred. In particular I will deal with what was said by the learned judge with regard to Buckley L.J.'s judgment in *Bisgood's* case. (1) He seems to me to have omitted to notice that in the passage which he cited from the judgment of the learned judge, the learned judge was really considering the liability which could be enforced against a member in a winding up, because the language of Buckley L.J. was this: "In the matter of liability upon his shares the statute provides in plain terms by s. 38, sub-s. 4, that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount unpaid on his shares. In my opinion, any attempt so to define the constitution of the company as that the member shall in an event be liable for a larger sum is in breach of the statute and is ultra vires." And he says that any clauses which can be used to maintain a scheme which imposes upon the member the alternative of accepting liability for a larger sum or forfeiture, are ultra vires. It seems to me that there the learned judge was dealing with the liability of the shareholder to contribute in the winding up, and was not in any way dealing with any collateral liability that might be imposed upon the shareholder by virtue of the special provisions of the articles of association or otherwise. And, in my judgment, the three

(1) [1908] 1 Ch. 743, 759.

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cases on which Lawrence J. relied in *Dibble's* case (1) do not really touch the point which we have to decide to-day. They in no way conflict with the decisions in the marine insurance cases, and the decision in the *Peninsular Co., Ld.* v. *Fleming* (2), which clearly recognized that there may be some special collateral liabilities attaching to a share by special contract which are in no way touched or destroyed or affected by the limitation of the liability of a member in respect of the general engagements of the company such as can be enforced in a winding up of the company.

For these reasons I agree that the appeal should be allowed in this case, and the result, of course, is that the decision in *Dibble's* case (1) is to be deemed to be overruled.

Solicitors: *Linklaters & Paines; Doyle, Devonshire & Co., for J. M. Shaw, Leek.*

R. M.

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SOUTHPORT CORPORATION *v.* BIRKDALE DISTRICT ELECTRIC SUPPLY COMPANY, LIMITED.

[1923. S. 2873.]

Electricity—Provisional Order—Maximum Charge—Local Authority original Undertakers—Transfer to new Undertakers with Board of Trade's Approval—Collateral Contract by new Undertakers not to exceed Prices of adjoining Borough—No Board of Trade Approval—Ultra vires—Electric Lighting Act, 1882 (45 *&* 46 *Vict. c.* 56), *s.* 11.

By a Provisional Order of 1898 the Birkdale Urban Council were constituted electricity undertakers in Birkdale with power to charge up to a certain maximum price, but with authority to make special agreements with particular consumers as to price.

By a transfer deed of December 31, 1901, approved by the Board of Trade, the Birkdale Council transferred the undertaking to the defendants, with a provision (cl. 18) for retransfer if the defendants made default in their obligations as undertakers.

By a supplemental deed of the same date, made without the approval of the Board of Trade, the defendants agreed with the Birkdale Council not to charge higher prices than those charged in the adjoining borough of Southport.

In 1911 the Birkdale District and the contractual rights of the Birkdale

(1) [1923] 1 Ch. 342. (2) 27 L. T. 93.

Council were transferred to the Southport Corporation, the present plaintiffs, but the defendants still remained electricity undertakers in Birkdale.

The defendants having recently begun to charge higher prices than the plaintiffs, the plaintiffs brought this action to restrain their breach of agreement.

The defendants contended that their agreement was ultra vires both under the Electric Lighting Act, 1882, s. 11, which prevented them divesting themselves of their statutory powers without the consent of the Board of Trade, and also under the general law applicable to statutory undertakings:—

Astbury J. *held*, that as the agreement, which was not an agreement with a particular consumer as to prices, might conceivably in the future hamper the defendants in the proper performance of their statutory duties, it was ultra vires.

On appeal:—

Held, that the agreement was a business transaction into which the defendants might reasonably enter; it did not fetter the powers of the defendants and was not incompatible with the performance by them of their statutory duties, and was not therefore ultra vires.

Rex v. *Inhabitants of Leake* (1833) 5 B. & Ad. 469; *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigations* (1866) L. R. 1 H. L. 254; and *Ayr Harbour Trustees* v. *Oswald* (1883) 8 App. Cas. 623 distinguished.

Decision of Russell J. in *York Corporation* v. *Henry Leetham & Sons* [1924] 1 Ch. 557 considered and doubted to some extent.

Decision of Astbury J., ante, p. 63, reversed.

APPEAL from the decision of Astbury J. (1)

By the Birkdale Electric Lighting Order, 1898, confirmed by the Electric Lighting Orders Confirmation (No. 8) Act, 1898 (61 & 62 Vict. c. ccvii.), the Birkdale Urban Council were empowered (ss. 4, 5, 6) as undertakers to supply and distribute electricity for all public and private purposes within the urban district of Birkdale as then constituted.

Sect. 21 required the undertakers to furnish a sufficient supply of energy to the owners and occupiers within the area of supply.

Sect. 24 provided that the undertakers might charge for energy supplied by them to any ordinary consumer (otherwise than by agreement)—(1.) By the actual amount of energy so supplied; or (2.) By the electrical quantity contained in the supply; or (3.) By such other method as might for the time being be approved by the Board of Trade. Provided that

(1) Ante, p. 63.

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a consumer who objected to method (3.) might require the undertakers to charge him at their option by methods (1.) or (2.).

Sect. 25 provided that the prices should not exceed those stated in Sch. 4—namely, method (1.) 13*s.* 4*d.* per quarter for the first twenty units and 8*d.* per unit afterwards, or method (2.), a charge by quantity based on those rates; or in the case of a method of charge approved by the Board of Trade such price as the Board should on approving that method determine.

Sect. 26 provided that, subject to the provisions of the Order and of the principal Act [i.e., the Electric Lighting Acts, 1882 and 1888, and any other Acts incorporated therewith], and to the right of the consumer to require that he should be charged according to some one or other of the methods above mentioned, the undertakers might make any agreement with a consumer as to the price to be charged for energy and the mode in which those charges were to be ascertained and might charge accordingly.

Sect. 57 empowered the Board of Trade to revoke the Order at any time with the consent and concurrence of the undertakers.

Sect. 59, sub-s. 1, provided that at any time after the commencement of the Order the undertakers might with the consent of the Board of Trade by deed to be approved by the Board of Trade transfer their powers, duties, liabilities and works to any company or person subject to such exceptions and modifications (if any) and for such period and upon such terms as might be specified therein, and either as to the whole or any part or parts of the area of supply and during the said period but subject to the provisions of the Order that company or person should to the extent of the powers, duties and liabilities so transferred be the undertakers for the purposes of the Order.

Sect. 71 provided that nothing in the Order should exempt the undertakers or their undertaking from the provisions of or deprive the undertakers of the benefits of any general Act relating to electricity, or to the supply of or price to be

charged for energy which might be passed after the commencement of the Order.

By a deed of transfer dated December 31, 1901, and made between the Birkdale Urban Council of the one part and the defendants of the other part, in consideration of the payment of 700*l.* the Birkdale Council transferred the undertaking and all their rights, duties and liabilities under the 1898 Order to the defendants [who had been incorporated for that purpose and], who save as thereinafter appeared were to be the undertakers for the purpose of the Order.

Clause 4 provided that if at any time after the expiration of seven years after the date of this deed of transfer the Birkdale Council should make a representation to the Board of Trade that the prices or methods of charge stated in Sch. 4 of the 1898 Order or approved by the Board of Trade ought to be altered, the Board of Trade, after inquiry, might make an Order varying those prices or methods of charge or substituting other prices or methods of charge in lieu thereof, and the prices or methods of charge so varied or substituted should have effect on and after such day as might be mentioned in the Order as if they had been stated in the schedule: Provided always that the prices and methods of charge for the time being in force might be altered in like manner at any time after the expiration of any or every period of seven years after the last alteration.

Clause 16 provided that the defendants should not consent to or concur in the revocation of the 1898 Order under the provisions of s. 57 thereof without the approval in writing of the Birkdale Council.

Clause 17 provided that s. 59 of the Order should not apply to the defendants as undertakers, and they should not, save as provided by this deed of transfer, be entitled to sell the undertaking or to transfer any of the powers, duties and liabilities thereby transferred to them to any other company or person.

Clause 18 provided that the defendants should duly and effectually perform all the obligations imposed upon them by this deed of transfer or as undertakers by the 1898 Order or

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by any regulations made by the Board of Trade thereunder. If any question should arise whether the defendants had made default in the due and effectual performance of those obligations that question should, if the Birkdale Council so required and whether the defendants were or were not liable in respect of that default to any other penalty under the Electric Lighting Acts or the 1898 Order, be determined by arbitration; and if the arbitrator was of opinion that the defendants had failed in material respects to work the undertaking as required by those Acts and the 1898 Order, and that it was desirable in the public interest that the working thereof should be resumed by the Birkdale Council, he might, by his award, require the defendants to sell the undertaking to the Birkdale Council, and thereupon the Birkdale Council might purchase and the defendants should sell the undertaking on the following terms—namely, the market value of the plant, machinery and buildings (less depreciation), only to be taken into consideration; no other capital or goodwill to be recognized; the Birkdale Council to deduct all costs and charges incurred in taking over the concern from the amount awarded by the arbitrator.

Clause 21 provided that the Birkdale Council might within six months after the expiration of fourteen years from the date thereof, and within six months after the expiration of every subsequent period of seven years, by written notice require the defendants to sell them the undertaking upon terms of their paying the amount of capital properly expended by the defendants for the purposes of the undertaking, plus 12½ per cent. if the notice was given within six months after the expiration of fourteen years; 10 per cent. if given within six months after the expiration of twenty-one years; 7½ per cent. if given within six months after the expiration of twenty-eight years; and 5 per cent. if given within six months after the expiration of thirty-five years, but without any addition if given after the expiration of forty-two years.

This deed of transfer was duly approved by the Board of Trade on January 30, 1902.

By a supplemental deed dated December 31, 1901, and

made between the Birkdale Council of the one part and the defendants of the other part, reciting that the Birkdale Council had agreed to transfer their powers under the 1898 Order to the defendants upon certain terms and conditions, some of which had been included in the deed of transfer approved by the Board of Trade, and reciting that other of those terms and conditions were not so included, but were part of the consideration for the transfer and were intended to be equally binding upon the defendants and the Birkdale Council, and to that end had been included in this supplemental deed, it was provided (cl. 4) that subject to any Order thereafter made by the Board of Trade the price to be charged by the defendants to private consumers of electrical energy should be for any quantity up to twenty units in any quarter 13*s.* 4*d.*, for any quantity not exceeding the equivalent of 100 hours of supply at the maximum demand in any quarter at the rate of 7*d.* per unit, and for any further quantity in such quarter in excess of the equivalent of 100 hours of supply at such maximum at the rate of 2*d.* per unit. But if in any year the price of electrical energy supplied exceeded the price of electrical energy supplied in the adjoining borough of Southport the before mentioned prices should be reduced and for so long as might be necessary in order that the said price might not exceed the price in the borough of Southport.

By an indenture dated August 2, 1904, and made between the Birkdale Council of the one part and the defendants of the other part, supplemental to the deed of transfer and supplemental deed, it was provided (cl. 1) that subject to any Order thereafter made by the Board of Trade the price to be charged by the defendants to private consumers of electrical energy supplied after January 1, 1904, should be on the maximum demand system, unless any consumer elected as thereinafter mentioned to be supplied on a flat or even rate not exceeding 5*d.* per unit, and where the wirings and fittings were the property of the defendants not exceeding 6*d.* per unit. But if at any time the foregoing price exceeded the price of electrical energy supplied in the adjoining borough of Southport the foregoing prices should be likewise reduced,

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and for so long as might be necessary in order that the same might not at any time exceed the price in the said borough. The expression "unit" in this clause should have the same meaning as in Sch. I. of the 1898 Order.

By the Southport (Extension) Order, 1911, confirmed by the Local Government Board's Provisional Orders Confirmation (No. 10) Act, 1911 (1 & 2 Geo. 5, c. clxxxv.), it was provided, art. iii. (1.), that the boundary of the existing borough of Southport should be altered so as to include the Birkdale Urban District.

Art. xi. (3.) (*c*) provided that the provisions of the Electric Lighting Orders Confirmation (No. 2) Act, 1891 (54 & 55 Vict. c. l.), so far as that Act related to the Southport Electric Lighting Order, 1891, should not extend and apply to that part of the borough which comprised the area of supply under the Birkdale Electric Lighting Order, 1898, until such date as the Southport Corporation became the undertakers under that Order, and until that date all powers, rights and duties of the Birkdale Council existing at the commencement of the present Order under the 1898 Order or under any agreement made in connection therewith, should vest in and attach to the Southport Corporation, and a reference to the Southport Corporation should be substituted for any reference therein to the Birkdale Council. Upon the date on which the Southport Corporation became the undertakers under the Birkdale Lighting Order, 1898, that Order should be repealed.

Art. xv. (2.) provided that anything duly done or suffered and all contracts, deeds, bonds, agreements and other instruments (subsisting at the commencement of the present Order) entered into or made by the Birkdale Council or their predecessors in relation exclusively to any part of the added areas should be of as full force and effect against or in favour of the Southport Corporation and might be continued and enforced as fully and effectually as if, instead of the Birkdale Council or their predecessors, the Southport Corporation had done or suffered the same or been a party thereto.

Under and by virtue of the Southport Electric Lighting

Order, 1891, confirmed by the Electric Lighting Orders Confirmation (No. 2) Act, 1891 (54 & 55 Vict. c. l.), the Southport Corporation were now carrying on an electrical undertaking within the area which on December 31, 1901, and August 2, 1904, constituted the borough of Southport.

For many years the defendants kept their prices down to those of Southport, but for the last two years they had exceeded the Southport prices.

On June 25, 1923, the plaintiffs, i.e., the Southport Corporation, commenced this action for an injunction to restrain this breach of agreement.

The defendants contended that the agreement was ultra vires, as without the consent of the Board of Trade they could not "divest themselves" of their powers to charge up to the maximum under the 1898 Order. They relied both on the Electric Lighting Act, 1882, s. 11 (1), and also on the general law of ultra vires applicable to statutory undertakings.

Astbury J. held that as the agreement, which was not an agreement with a particular consumer as to prices, might conceivably in the future hamper the defendants in the proper performance of their statutory duties, it was ultra vires.

The plaintiffs appealed. The appeal was heard on April 24, 27, 28, 1925.

W. A. Greene K.C. and *Bischoff* for the appellants. The only real defences now relied upon by the respondents are ultra vires by common law and by statute. The judge in the Court below really based his decision on the common law.

The case for the respondents is put in this way: that in some conceivable circumstances the respondents might as a result of the agreement have to put their shutters up and therefore that the provision in question is ultra vires. But this is a business agreement entered into by business men. To say that this contingency might happen and therefore that the provision is ultra vires is unduly to extend the doctrine

(1) Sect. 11 provides that "no local authority company or person shall . . . . divest themselves of any legal powers given to them . . . . by any . . . . Order . . . . without the consent of the Board of Trade."

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of ultra vires. This is a limitation on charge inserted in the public interest. No doubt the true basis of the agreement is that the Southport Corporation should continue to carry on their undertaking as a commercial undertaking. The financial tables prepared by Mr. Collins show that if the defendants had charged the same prices as the Southport Corporation they would still have made a profit. The judge did not decide this case with reference to the particular facts but with reference to what might possibly have been the facts. The Court is not here concerned with difficulties of construction but with the question of ultra vires. In considering the question of ultra vires regard must be had to the nature of the contracting body.

[SARGANT L.J. It is necessary to consider the vires.]

It is a strong thing to say that because a bargain is improvident therefore it is ultra vires.

[WARRINGTON L.J. The judge seems to have founded his judgment very largely on *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigations*. (1)]

On the question of ultra vires, the rights which the contract impeaches must be inconsistent and incompatible with the exercise of the undertakers' statutory powers at the date of the contract itself. It is not enough if the contract may become ultra vires. The test has to be applied at the date of the contract. In *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigations* (1) the incompatibility was in the contract itself. Different considerations apply where land or rights over land are concerned, for in that case the undertakers cannot contract against the public good; but a question of making charges, such as the present, is a wholly different matter. That distinction differentiates this case from cases like *Rex* v. *Inhabitants of Leake* (2) and *Ayr Harbour Trustees* v. *Oswald*. (3) *South Eastern Ry. Co.* v. *Cooper* (4) really bears out the proposition. Down to the decision in *York Corporation* v. *Henry Leetham & Sons* (5)

(1) L. R. 1 H. L. 254.
(2) 5 B. & Ad. 469.
(3) 8 App. Cas. 623.
(4) [1924] 1 Ch. 211.
(5) [1924] 1 Ch. 557.

there was no case dealing with powers of charging. Prima facie there is nothing in a restriction upon charging powers which is incompatible with the powers or duties of a statutory body, and it is submitted that the *York* case (1) was wrongly decided. At the date of the contract the undertakers took a standard of charges which would enable them to carry on the undertaking and make a profit, and the respondents have produced no evidence to show that the agreement was inconsistent with either of those objects.

The restrictive part of s. 11 of the Electric Lighting Act, 1882, which is re-enacted as a substantive enactment by s. 14 of the Electric Lighting Act, 1909, must be read with the earlier part of the section which deals with contracting and sub-contracting for the maintenance of works for the supply of electricity, and refers to quite a different class of powers, and does not help the respondents in a case like the present which relates only to restrictions on charges. Having regard to s. 6 (*d*) and s. 20 of the Act of 1882, it is a misuse of words to say that a limitation of charging under those sections is to be treated as being one of the powers in respect of which there is to be no contracting out under s. 11; and ss. 24, 25, and 26 of the Birkdale Electric Lighting Order bear that out.

Clauson K.C. and *Guest Mathews* for the respondents. This is a question, not of public benefit, but whether or not this contract is an attempt to impose a fetter which the Legislature has not authorized in the carrying out of the statutory powers and duties conferred and imposed upon the undertakers.

In 1901 when this agreement was made there were two schools of thought as to the possibility of undertakers under the Electric Lighting Acts binding themselves by provisions of this nature, and when the transfer was being negotiated the Board of Trade sanctioned the transfer but were not willing to make it a term of the transfer that the company should bind themselves by this provision. Accordingly the supplemental deed was executed. In 1905 the matter was

(1) [1924] 1 Ch. 557.

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cleared up by the decision in *Sudbury Corporation* v. *Empire Electric Light and Power Co.* (1), which lays down that where the Legislature has invested a particular corporation with powers and duties, it is for the corporation to carry out those duties. The decision in that case turned upon the vice of delegation, and shows that a body in which a discretion has been vested cannot put it in the hands of another body. In this case the powers, duties and discretions of the respondents are delegated and fettered, and that cannot be done: *Ayr Harbour Trustees* v. *Oswald* (2); *Gardner* v. *London, Chatham and Dover Ry. Co.* (3); *Marshall* v. *South Staffordshire Tramways Co.* (4); *In re Woking Urban District Council* (*Basingstoke Canal*) *Act*, 1911. (5)

The Board of Trade insisted upon the insertion of cl. 4 in the deed of transfer, but the supplemental deed is inconsistent with it, and the sanction of the Board was given after the execution of the latter deed, but does not refer to it. In *Lambeth Corporation* v. *South London Electric Supply Corporation* (6) Bigham J. held that a supplemental deed executed without the sanction of the Board of Trade was ultra vires, but the Court of Appeal reversed his decision. In that case however the supplemental deed related to a wholly different matter and was not a restriction of the statutory powers and duties of the undertakers.

Clause 26 of the Order enables the undertakers to arrange and restrict prices with a consumer, but they are not empowered to restrict themselves otherwise. The respondents are not bound by this restrictive clause: *Staffordshire Canal* case (7); *York Corporation* v. *Henry Leetham & Sons.* (8)

In the *York* case (8) the distinction between statutory profit making undertakings and statutory non-profit making undertakings was not taken.

Where the Legislature has vested in a body of persons special powers of interfering with the property of other

(1) [1905] 2 Ch. 104.
(2) 8 App. Cas. 623.
(3) (1867) L. R. 2 Ch. 201.
(4) [1895] 2 Ch. 36.
(5) [1914] 1 Ch. 300.
(6) (1907) 96 L. T. 440.
(7) L. R. 1 H. L. 254.
(8) [1924] 1 Ch. 557.

persons, that body must exercise those powers themselves and must not delegate them or fetter themselves in the exercise of them by the volition of others. That duty is always imposed on the persons to whom the powers are entrusted whether the exercise of them results in a profit or a loss. That principle is clearly laid down in the *Staffordshire* case (1) and in the *Ayr* case. (2) You start with the principle that the powers given by the Legislature are not to be fettered.

If the Court adopts the principle contended for on behalf of the appellants it will be grafting an anomaly upon a well established principle.

We cannot add anything to the arguments for the respondents as stated by Astbury J. in his judgment. (3)

The judgment of Astbury J., it is submitted, was perfectly right and should be affirmed.

W. A. Greene K.C. in reply. The respondents' main proposition hangs on this, that there is here a power of which the respondent company are the trustees. But the respondents are a commercial company whose main object it is to earn profits. There is no real analogy between this case and that of a case where power is given to acquire land compulsorily. There is no statutory obligation on the respondents to keep their undertaking going. The *Sudbury Corporation* case (4) has no bearing on the present case.

[POLLOCK M.R. We do not think you need trouble about that case.]

POLLOCK M.R. This appeal raises an important and interesting point which lies in a narrow compass. I do not propose to recapitulate the facts or the material sections of the Provisional Order, which are carefully and sufficiently stated in the report of the case in the Court below (5), and which appear in the judgment of Astbury J. It is sufficient for the purpose of making my judgment plain to recall the

(1) L. R. 1 H. L. 254.
(2) 8 App. Cas. 623.
(3) Ante, pp. 63, 73.
(4) [1905] 2 Ch. 104.
(5) Ante, p. 63.

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fact that in 1898 there was an Electric Lighting Order passed for Birkdale. Birkdale was at that time an area adjacent to Southport, and there was a Birkdale Urban District Council which was in charge of the administration of the affairs of Birkdale. That Electric Lighting Order gave powers to the Urban Council of Birkdale to provide electricity within the area which is defined in the Order. That Order by s. 59 provided that the undertakers, that is the Birkdale Urban District Council, might, with the consent of the Board of Trade, transfer their powers, duties and liabilities of providing electricity in Birkdale to any company or person, and, as a matter of fact, there was, by a deed of December 31, 1901, a transfer of the powers of the Birkdale Urban District Council to the present company, the Birkdale District Electric Supply Co., Ld. In the Order it was provided by s. 26 that: "Subject to the provisions of this Order and of the principal Act"—that is the Electric Lighting Acts of 1882 and 1888 and other Acts incorporated therewith—"and to the right of the consumer to require that he shall be charged according to some one or other of the methods above mentioned the undertakers may make any agreement with a consumer as to the price to be charged for energy and the mode in which those charges are to be ascertained and may charge accordingly." The limit which is imposed in that section by the words "Subject to the provisions of this Order and of the principal Act" introduces into s. 26 the provisions of s. 20 of the Electric Lighting Act, 1882, which are: "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the licence, Order or special Act authorising them to supply electricity." Thus when the question we have to determine comes before us the position is that the Birkdale District Electric Supply Co. have transferred to them the powers which had originally been granted to the Birkdale Urban District Council, and they have the powers to charge

which are contained in s. 26 of the Order as modified by s. 20 of the Act of 1882 which I have read.

The transfer was carried out, as I have said, by a deed dated December 31, 1901, but there was also a supplemental deed of the same date. To the first deed the Board of Trade gave their consent, as was necessary under s. 59 of the Order, which provided that a transfer should be made. The second deed was not submitted to the Board of Trade for their assent, and it was at one time said that such a method of transfer was not in accordance with the law, that if the transfer was to be made subject to the approval of the Board of Trade the Board of Trade must assent to all the terms, and that in the present case where you find a supplemental deed which recites that there are other terms and conditions not included in the first deed of the same date which are to be equally binding on the company and consumer, and to that end have been included in the supplemental deed, then the assent of the Board of Trade ought also to have been obtained to those terms and conditions in the same way as it had in fact been obtained to the terms and conditions of the first deed. That point does not really arise in this case. It appealed to Bigham J., who had to decide *Lambeth Corporation* v. *South London Electric Supply Corporation* (1), but on appeal the Court held that the course that was pursued in this case might be adopted, and that there might be inserted a certain number of collateral terms or conditions in a different document without imperilling the validity of the transfer. A distinction was drawn between provisions which were the main provisions of the agreement and those which were collateral to it. It may be that the Board of Trade themselves were concerned to assent to what might be called the vital provisions, but were not concerned to give their assent to detailed or collateral provisions of importance between the transferor and the transferee, but not essential to the validity of the transfer itself. However, the method adopted in this case is after the *Lambeth* case (1) a correct one, and on this point the argument of the plaintiffs as summarized

(1) 96 L. T. 440.

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by Astbury J. (1) in his judgment is really accepted by Mr. Clauson as accurate: "There is no divesting here of any power, but only a qualification of its exercise, and the non-approval by the Board of Trade of the contract in question is immaterial if its terms are collateral and not inconsistent with carrying out the Order." I therefore turn to the supplemental agreement, for it is upon cl. 4 of that agreement that the controversy in the present case turns. By that clause the defendant company agreed to charge prices which had appeared in a previous agreement made by the Birkdale Urban District Council, and which were as follows: "Subject to any Order hereafter made by the Board of Trade the price to be charged by the company to private consumers of electrical energy shall be for any quantity up to twenty units in any quarter 13*s.* 4*d.*, for any quantity not exceeding the equivalent of 100 hours of supply at the maximum demand in any quarter at the rate of 7*d.* per unit, and for any further quantity in such quarter in excess of the equivalent of 100 hours of supply at such maximum at the rate of 2*d.* per unit." The clause then proceeded: "But if in any year the price of electrical energy supplied exceeds the price of electrical energy supplied in the adjoining borough of Southport the before mentioned prices shall be reduced and for so long as may be necessary in order that the said price may not exceed the price in the borough of Southport."

As a matter of history in 1911, by the Southport (Extension) Order, 1911, the boundary of the then existing borough of Southport was altered so as to include the Birkdale Urban District. This supplemental agreement of December 31, 1901, therefore in effect provides that in what I will call the Birkdale area of the borough of Southport the prices that are to be charged for electrical energy are not to exceed the prices that are to be charged in the other parts of the borough of Southport, for the borough of Southport remains the electrical authority for its own area, and the power to supply electrical energy in the Birkdale area is still conferred and belongs to the present defendant company.

(1) Ante, pp. 63, 72.

It is said that the machinery of these two agreements of December 31, 1901, having been legitimately adopted, the question still remains whether or not this limitation imposed by cl. 4 that the price in Birkdale shall not be higher than the price in Southport—I put the effect of the clause quite shortly—is one which is ultra vires of the Birkdale Urban District Council and no longer of binding force, because it is in effect a fetter upon the powers, duties and responsibilities with which the Urban District Council of Birkdale were originally charged and which are now vested in the defendant company.

The action is brought by the Southport Corporation to enforce cl. 4. The defence raised before Astbury J. was that this clause was not binding upon them because it was ultra vires, and the learned judge has held that the point was a good one, and has dismissed the action on the ground that this term, which has been described by Mr. Clauson as a fetter upon the powers of the Birkdale District Council, was one which was so incompatible with the duties and responsibilities laid upon them that it was one by which they could not legitimately consent to be bound.

I think it is unnecessary to enter into the cases at length. We have had an opportunity quite recently in *South Eastern Ry. Co.* v. *Cooper* (1) of considering all the cases which are commonly cited upon this point, and my judgment and those of my learned brothers in that case deal with the succession of authority, and by that decision we are bound.

The question is whether or not this cl. 4 is a term of such a nature that it cannot be legitimately entered into by the Birkdale District Council and cannot be binding upon the defendant company. After a very careful examination of the cases it appears to me that there is really no new law that could be developed by this case, and I think we may refer to the two or three cases which have been most markedly brought to our attention for a statement of the law which has to be applied.

In *Rex* v. *Inhabitants of Leake* (2) the contest arose whether

(1) [1924] 1 Ch. 211. (2) 5 B. & Ad. 469.

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there could be a valid dedication by a drainage authority in Lincolnshire to the public at large by which the public at large acquired a right of way along a roadway which ran along the side of one of the big drains or canals in Lincolnshire. It was there suggested that inasmuch as the Commissioners for the drainage had to maintain the canal or drain it would be wrong in reference to those Commissioners to suppose that they could at any time have dedicated to the public rights, the dedication of which might interfere with the performance of their duties as such Commissioners. The test which Parke J. there said ought to be applied was a very old one and one which has stood for many years, and he applied it in this way. He said (1) : "If the land were vested by the Act of Parliament in Commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable, in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the Commissioners have that power."

In the *Staffordshire and Worcestershire Canal Navigation* v. *Birmingham Canal Navigations* (2) the question arose whether an agreement made by the proprietors of a canal who were entrusted with statutory powers to supply water to another canal in the system was valid, and Lord Chelmsford L.C. said (3) : "They (i.e. the proprietors) could not bind themselves that, for all time to come, a certain quantity of water should be discharged from their canal into that of the appellants, because it was impossible for them to know whether all the water beyond what was necessary to keep open the communication between the two canals would not be wanted for the purpose of their own canal. By a grant of the continual use of the quantity of water flowing from their canal into the canal of the appellants, the respondents would have fettered themselves in the exercise

(1) 5 B. & Ad. 478. (2) L. R. 1 H. L. 254.
(3) Ibid. 267, 268.

of the powers vested in them by the Act for extending, preserving, and improving their canal, for which the application of all the water beyond what was necessary for keeping up the communication between the two canals might have been essential."

The third case is *Ayr Harbour Trustees* v. *Oswald* (1), where trustees who were charged with the maintenance of a harbour had under their statutory powers taken certain land, and it was said that an agreement by them limiting the use of the land when taken by them would be bad. Lord Blackburn there applies this principle: "I think that where the Legislature confer powers on any body to take lands compulsorily for a particular purpose, it is on the ground that the using of that land for that purpose will be for the public good. Whether that body be one which is seeking to make a profit for shareholders, or, as in the present case, a body of trustees acting solely for the public good, I think in either case the powers conferred on the body to take the land compulsorily are intrusted to them, and their successors, to be used for the furtherance of that object which the Legislature has thought sufficiently for the public good to justify it in intrusting them with such powers; and, consequently, that a contract purporting to bind them and their successors not to use those powers is void."

In each of those three cases the powers which were possessed by the public body were special powers with which they had been entrusted for the public good, and the cases are illustrations of the application of the principle that where certain bodies are given by the Legislature powers to acquire the property of others or to exercise rights over the property of others they cannot dispense with those powers or fetter themselves in the exercise of them. I think from the passage which I have read from the judgment of Lord Blackburn in the *Ayr Harbour Trustees* case (1) that it does appear that no distinction is made between what may be called profit making companies, and corporations carrying on an undertaking for the public without profit or with a

(1) 8 App. Cas. 623, 634.

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limited profit. If those bodies are charged with duties and are given powers for the purpose of carrying out those duties they must fulfil their duties and cannot fetter themselves in the exercise of, or discharge themselves from, those powers with which they have been so entrusted. I agree also with what was said by Russell J. in the *York* case (1) that, when you examine the bargain or the contract which is in issue, you must look at the date at which it was made. He says: "If the bargain was at its date within the powers of the Corporation the fact that it turned out a bad bargain from their point of view would not convert it into an ultra vires transaction. Conversely if it was at its date beyond the powers of the Corporation the fact that it proved a profitable one for the Corporation would not render it intra vires."

Bearing in mind those tests I have to consider whether or not this cl. 4 of the agreement of December 31, 1901, is valid or not. Astbury J., in stating the argument put forward by the plaintiffs, said (2): "If the defendants are proved to have bound their hands to such an extent as to be incompatible with the discharge of their duties, their agreement to do so would be bad, but a mere agreement as to charges cannot cause such a result." He goes through the cases to which I have referred, and deals at length with the powers with which the Birkdale Urban District Council were entrusted under their Provisional Order, but he ultimately comes to the conclusion that in some way this limitation of price which is accepted by the defendant company is one which cannot be binding upon the defendant company, because it is incompatible with the due exercise by them of their responsibilities in providing electric light.

I have already pointed out that under s. 26 a particular agreement can be made as to the method and the prices for electrical energy to be charged. Astbury J. found that this clause was not a mere agreement as to charges, but was a fetter. The use of these metaphorical expressions is often unfortunate, because they very often beg the question. What

(1) [1924] 1 Ch. 557, 569. (2) Ante, pp. 63, 72.

we have to see is what has been done by the defendant company when they have agreed that when the borough of Southport make a certain charge they will undertake to make the same charge. Put shortly the meaning of the last five lines of cl. 4 appears to be this, that when the Southport Corporation find it possible to reduce the price for electrical energy, the undertakers, now the defendant company, have agreed that they will similarly reduce their charges for electrical energy: in other words, that what can be done in Southport can be done in Birkdale. That part of the agreement may be of very important public advantage to the dwellers in Birkdale. It may also be a matter of advantage not only to the dwellers in Birkdale but also to the defendant company itself, because it may be able to find a larger number of consumers if those consumers can be confident that at no time will the rate that is to be charged for the electrical energy supplied to them rise beyond a price which is to obtain in the adjoining and neighbouring borough of Southport. The words of the clause are somewhat precise in this, that the price charged in Southport has to be compared with that charged in Birkdale, and for my part the suggestion that no real price might be charged by the Southport Corporation because their undertaking in the borough of Southport might be carried on by a recourse to the rates is a hypothesis which may be thrown aside as quite unlikely and more than unlikely; indeed I doubt that in carrying on the undertaking on such a method a price within the meaning of that clause would be charged within the borough of Southport.

After very carefully considering the terms of the clause I cannot find that the clause is one which imposes a fetter. It seems to me one characterised by business prudence and one into which the defendant company might well, in the exercise of their discretion, have come to the conclusion that they might enter. It appears to me that it is neither a fetter upon any powers which they may have to exercise, nor a fetter upon any right which they may hereafter have to use as against some private owner of property, but embodies a practical system of charging which may well be brought

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within the general powers of charging which are preserved to them and which enables them to make special and particular charges provided that no special preference is given to a particular consumer. Astbury J. came to an opposite conclusion, and I need hardly say that I differ from him both with reluctance and with great respect to his judgment, but it appears to me that, although he and I agree upon the law to be applied, he has differed in the estimate that he has made of the nature and quality of this clause, and it is upon that ground that I find that this clause does not fall within the tests of what have been called fetters and is not incompatible with the carrying on of the business with which the defendant company are entrusted.

I would like to say one word about what we have called the *York* case. (1) There again Russell J. does not suggest any difference in the law from that which I have found is to be as derived from the cases I have referred to, but he came to the conclusion that the particular agreements that had been entered into in that case by the York Corporation did impose a fetter on the York Corporation. I think it is a little difficult to follow that case, because I doubt whether it is as fully reported as would be necessary in order to enable one to form a fair and just estimate upon it. What I will say about it is this, that I think there is no difference in the law to be applied, and that all that happened in that case was that there was a particular application of the law agreed upon both in that Court and in this Court.

Returning, however, to the present case, it appears to me that this system of measuring the sum to be paid in Birkdale by a price which shall prevail in Southport cannot be described as a method incompatible with the carrying on by the defendants of the undertaking of which they have charge, and does not fetter their powers; it is part of a business arrangement into which the defendants might legitimately enter. Having therefore arrived at that conclusion I think the learned judge was wrong in dismissing the action, and that the judgment ought to have been given

(1) [1924] 1 Ch. 557.

for the plaintiffs in the action substantially for the remedy which they ask for in their statement of claim. The appeal will therefore be allowed with costs.

WARRINGTON L.J. This is an appeal from the judgment of Astbury J. refusing to enforce a contractual obligation entered into by the defendant company on the occasion of the transfer to them of a Provisional Order which constituted the Birkdale Urban District Council undertakers for the supply of electrical energy in their district. As the result of the transfer the defendant company became the undertakers in the place of the Birkdale Urban District Council. The plaintiffs, the Southport Corporation, are now the local authority, not only for the borough of Southport as it existed at the date of the Birkdale Order and for some years afterwards, but they are also the local authority for the Birkdale district, that district now being incorporated in the borough of Southport, and as that local authority they are the successors of the Birkdale Urban District Council and entitled to enforce contracts made by that body. The particular obligation which is in question relates to the price to be charged by the defendant company for the supply of electrical energy in the old Birkdale area. The provision is contained, as I have already said, in a deed executed contemporaneously with the transfer of the Provisional Order to the company and which contained certain collateral obligations which were not incorporated in the deed of transfer itself, and did not receive, as the deed of transfer did, the sanction of the Board of Trade, but it is now common ground that that particular circumstance, that is to say that the obligations were contained in the supplemental deed, does not affect their validity. The obligation, as I have already said, related to the price to be charged for electrical energy. It is cl. 4 of the supplemental deed of December 31, 1901. The first part of the clause fixes the price to be charged to private consumers, and then it contains this proviso at the end: "But if in any year the price of electrical energy supplied exceeds the

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price of electrical energy supplied in the adjoining borough of Southport "—that means the borough of Southport before the incorporation of the Birkdale district—" the before mentioned prices shall be reduced and for so long as may be necessary in order that the said price may not exceed the price in the borough of Southport." It is admitted that the defendant company are infringing, and intend to infringe, unless restrained by order of the Court, the obligations imposed upon them by that stipulation, but they say that they are justified in so doing, because that stipulation was, when it was made, ultra vires, and is not and never has been binding upon them, and further that it is not binding upon them because it purports to interfere, and does in fact interfere, with the exercise by them of the statutory powers entrusted to them as the body by statute authorized to supply the electrical energy in the district to which the Provisional Order relates. In support of that contention reliance is placed upon a well known principle of law, that if a person or public body is entrusted by the Legislature with powers and duties for public purposes, powers and duties which interfere with the private rights of individuals, and, as an example of such interference, authorize the acquisition by such person or public body of private property or the interference with the private rights, then those powers and duties must be exercised by the person or public body to which they are entrusted, and any contract entered into by the person or public body incompatible with the due exercise of their public duties will be invalid. As an example of the application of this principle reference is made to the case of harbour trustees, who being by statute authorized to acquire land for the extension of the harbour and to erect upon that land quays, buildings or what not for the purposes of the harbour, are not at liberty to enter into a contract which will prevent them from making such use of any part of the land which they so acquired: *Ayr Harbour Trustees* v. *Oswald*. (1) So too the case of a railway company which

(1) 8 App. Cas. 623.

has acquired land for the purpose of one of its stations and has built the station upon arches which formed part of the substructure of it, cannot validly grant to a third person a right of way through one of those arches, because such right of way would interfere with the use by the railway company of the land over which it was granted for the purpose of their railway: *Mulliner* v. *Midland Ry. Co.* (1) Another example given is the case of canal trustees who were carrying on the public undertaking of a canal, and who, it was held, were not at liberty, and could not in law bind themselves, to make use of the surplus water flowing from their canal in such a way as would prevent them from making the best use of it for the purposes of their canal: *Staffordshire Canal* case. (2) With the exception of the present case and the *York* case (3) recently decided by Russell J. no authority has been cited to us of the application of that principle to the right of a body, such as the defendant company, to fix its prices for the commodity which it supplies, and I think that the real question which we have to determine is whether the Legislature has in this particular case so regulated the exercise by this body, which, after all, is a commercial body carrying on a commercial undertaking, of its right to charge for the commodity it is supplying that it cannot in law enter into such a contract as that which is before us.

Now to solve that question one must see how the Legislature has dealt with the question of price. The statute which regulated the electric lighting and supply of electrical energy at the date of this contract was the Electric Lighting Act, 1882. That Act did not prescribe the price which might be charged by the undertakers for the supply of electrical energy: all that it did in the interests of the public was to impose a maximum limit upon the price which might be so charged. That limit is referred to in s. 6 of the Act, which provides that: "The undertakers shall be subject to such regulations and conditions as may be inserted in any license, Order, or special Act affecting their undertaking with regard

(1) (1879) 11 Ch. D. 611. (2) L. R. 1 H. L. 254.
(3) [1924] 1 Ch. 557.

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to the following matters," and then among those matters specified is the limitation of price to be charged in respect of the supply of electricity. The only other section which has any bearing upon the question which I have to put myself to answer, as to what the Legislature has done with reference to prices, is s. 20 of the same Act. It is a short section, and I will read the whole of it: "The undertakers shall not, in making any agreements for a supply of electricity, show any undue preference to any local authority, company, or person, but, save as aforesaid, they may make such charges for the supply of electricity, as may be agreed upon, not exceeding the limits of price imposed by or in pursuance of the license, Order, or special Act authorising them to supply electricity." It seems to me that those provisions show quite plainly that the Legislature, in entrusting to the body, either a local authority or such a body as the present company which is carrying on commercially the business of the supply of electricity, left it as a matter of commercial good sense to that body to settle what price it would charge for the commodity it was supplying subject only to this, that the interests of the public must be observed to this extent, that no more than the maximum price should be charged.

I now turn to the Birkdale Order, which is scheduled to the Confirmation Act of 1898, to see whether there is anything in it which imposes any further restrictions upon the mode in which the undertakers may exercise the particular power in question. Sect. 24 of that Order provides: "The undertakers may charge for energy supplied by them to any ordinary consumer (otherwise than by agreement)—(1.) By the actual amount of energy so supplied," and in certain other methods which I need not trouble to read. Sect. 25 provides that consumers are not to pay more than the maximum charge specified in the schedule. Then s. 26 provides that: "Subject to the provisions of this Order and of the principal Act and to the right of the consumer to require that he shall be charged according to some one or other of the methods above mentioned the undertakers may make any agreement with a consumer as to the price

to be charged for energy and the mode in which those charges are to be ascertained and may charge accordingly." It is quite true that within its terms that last provision only authorizes agreements with consumers, but the point of it is that it is left to the body in question to settle according to its own discretion what the amount of the charge shall be, and in this Provisional Order, just as in the Act, no attempt is made by the Legislature to interfere with the body in thus fixing its charges. What is the effect of the present contract? It seems to me that the contract, which, as I have pointed out, was made on the occasion of the transfer, was entered into by a body which was out to undertake the supply of electrical energy in Birkdale as a commercial undertaking: it was an ordinary limited company formed for that purpose. It was thought, as must be assumed, that from the commercial point of view it was worth the company's while to take over this Order and at the same time to enter into the obligation which is expressed in the agreement I have read. Why, in making that contract, were they acting in any way or putting themselves under an obligation incompatible with the exercise of the public duty imposed upon them to supply electrical energy? I really fail to see how they were. It may be that in the result it will turn out that what the company did was commercially improvident, but that was a matter for them to consider, and if it should so turn out, so much the worse for the company, but in entering into an improvident bargain in a commercial sense they were not doing anything which they were prohibited from doing by the statutes under which they were acting. I am not for the moment saying that the bargain is an improvident one: I am only referring to an argument which was made use of both before Astbury J. and before us to the effect that it might so turn out, and might even be so disadvantageous that the undertaking could not be carried on, but that is not the question. The real question is whether there is anything in the Acts with which we are dealing which renders such a bargain incompatible with the performance of the public duties entrusted to the company.

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It is on this point that I differ with respect from the judgment of Astbury J. I can find nothing in the legislation in question here which laid upon this body any duty with regard to the prices otherwise than to fix them in accordance with ordinary commercial good sense. I say nothing as to what would happen in case the Southport Corporation should, as the electricity authority in the Southport area, think fit to charge some mere nominal sum for electricity and throw the loss thereby incurred on the rates. I say nothing about what might happen if such a very improbable course should be taken. As to that I can only refer to the fact that the contract in question refers to the price to be charged, and it seems to me that when it is referring to the price to be charged by the Southport Corporation it means a price that is a real price for the commodity purchased by those to whom it is supplied. It is perfectly unnecessary to deal with a question of that sort which has not arisen.

With regard to the *York* case (1) I will only say that I doubt whether the judgment of Russell J., so far as it is founded upon the idea that the fixing of tolls and rates by any but ordinary considerations would be ultra vires would stand with the judgment we are pronouncing, but I do say this that it may well be, and that matter may have to be considered, that that judgment could be supported on another ground—namely, that what the York Corporation had done by the two agreements there in question was to bind themselves to charge to particular persons not tolls and charges such as they were authorized to charge by their Acts of Parliament but a lump sum of money in lieu of such tolls and charges. It may be that upon that ground what they agreed to do was outside their powers. I only throw that out as a suggestion, because the judgment in the *York* case (1) is not directly before us, but if and so far as that case and this case stand on the same footing, then I think the *York* case (1) must be treated as overruled. I agree that the appeal ought to be allowed, and I think the relief asked by the first paragraph of the prayer of the statement of claim is in the correct form.

(1) [1924] 1 Ch. 557.

SARGANT L.J. I am of the same opinion. The respondents have sought to support the judgment of the learned judge by reference to a large number of cases, of which the *Ayr Harbour Trustees'* case (1) is a familiar example. In my judgment cases of that kind are not really analogous to the present case; they were cases in which statutory undertakers had acquired particular properties for the purpose of their undertaking, and it was held that having acquired those particular properties for those statutory purposes they must not deprive themselves of the powers entrusted to them by the Legislature for the purposes of the undertaking, any such deprivation being incompatible with and repugnant to the purposes for which they had been allowed so to acquire the properties. The *Staffordshire Canal* case (2) is one of a slightly different kind, but there it was held that, inasmuch as there were statutory obligations to be performed by the Proprietors of the Birmingham Canal Navigations with regard to the use of the water that had been accumulated in a reservoir or other receptacle, it must have been impossible for them to make any grant to another canal company, which would have the effect of freeing water in that reservoir from being applied in the way in which it had to be applied having regard to the obligations of the Birmingham Canal Company.

There are many other cases of the same character as those to which I have referred, such as *Mulliner* v. *Midland Ry. Co.* (3) and other cases which are referred to in the judgment of Russell J. in the recent *York* case. (4) But there is here no question at all of dealing with or restricting the user of any particular property. We have only to deal with an agreement regulating the price to be charged for certain services to be rendered or commodities to be supplied. I cannot see any analogy between those cases and the present case unless you extract from the statutory constitution of the defendant company some obligation on them to apply specifically towards the

(1) 8 App. Cas. 623.
(2) L. R. 1 H. L. 254.
(3) 11 Ch. D. 611.
(4) [1924] 1 Ch. 557.

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upkeep of their undertaking the receipts that they are to get from the supply of electrical energy or some definite portion of those receipts. The expense of the upkeep of the undertaking of the defendant company is merely one of the general expenses which they as a commercial company are liable for, and which has to be met, like other expenses, out of their general fund. I cannot see here anything which casts upon the company any obligation specifically to employ any receipts which they may derive from the sale of electrical energy in the upkeep of the undertaking, and I think that fact is brought out very markedly in the deed of transfer which was approved by the Board of Trade at the time when the urban district council transferred the concession to the company. For under s. 52 of the Provisional Order there was an obligation upon the corporation to deal with the revenue which they derived from their undertaking in particular in a very detailed manner. But when the transfer was approved by the Board of Trade that section was entirely struck out, and, in my judgment, was struck out as being inapplicable to a commercial company which would prima facie have a free hand as to the method of dealing with its commercial receipts for its general commercial purposes.

The *York* case (1) is a case very much nearer the present and differs altogether, like the present case, from the cases to which I have already referred, and so far as the judgment of Russell J. is founded upon an analogy drawn between those cases and the *York* case (1) I think that is subject to the same criticisms as the case with which we are now dealing, and that to that extent it can hardly stand with the judgment of the Court in the present case. But the case itself was a very peculiar one. It was one in which the principal navigation that had to be dealt with was the Ouse navigation, which had originally been placed in the hands of trustees for public purposes and with regard to which there undoubtedly was a specific liability to apply the receipts towards the upkeep of the navigation. And although that was not the case with regard to the less important Foss

(1) [1924] 1 Ch. 557.

navigation still there had been a transfer of the obligation and of the undertaking to the York Corporation, who themselves were or might be considered to be in the position of trustees for the public. I do not say they were so exactly. I will refer to the passage in the judgment of Russell J., where he deals with the general question. He says (1): "As I have already indicated, the plaintiffs are invested with statutory powers of charging such tolls, within limits, as they may deem necessary for the purpose of carrying on these two undertakings in which the public are interested." I think that he was there consciously or unconsciously dealing with the matter upon the basis that there was something which imposed a direct statutory obligation on the corporation with regard to the application of those funds, and that if that were so, it would differentiate the case altogether from the present case. There was this further point in the case, that whereas the corporation were bound to charge tolls for the use of the navigation they made an agreement under which beyond a certain point no tolls at all were to be charged, but that the services were to be rendered free to Henry Leetham & Sons, Ld., or rather to their predecessors in title, which appears in itself to be a direct breach of the provisions of the statutory obligation. And, therefore, although a considerable part of the reasoning of Russell J. in that case may be incompatible with the judgment that is now being given, it by no means follows that there are not grounds on which the actual decision in that case may be supported.

It seems to me that there has here been designedly left in the hands of the respondent company, which is an ordinary commercial profit earning company, the entire management of the commercial side of the undertaking. It is true that maximum rates are prescribed, but those maximum rates are fixed for the protection of consumers who would otherwise be at the mercy of a monopolist, and on the other hand there is no obligation whatever cast upon the company to charge those maximum rates to the full. That question is left to the ordinary business acumen and discretion of the business

(1) [1924] 1 Ch. 557, 569.

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managers of this commercial concern. With regard to that they are left with full commercial liberty to make such bargains as they may think fit. It is here said that by agreeing that they will charge no more than will be charged by an adjoining area, which might be and which I think may be shown to be a slightly better field for electrical enterprise than the field in the present case, they have entered into what may be an improvident bargain, which might result in so great a loss of profit or indeed in such an absolute loss as to result in the winding up of the undertaking and an inability to carry it on in the future. There is no evidence at all to that effect, and indeed there seems to have been a very substantial profit earned throughout by the company, indeed such a profit that a substantial margin would be left now if the company were fulfilling the bargain which they entered into. However that may be, if a loss were incurred that would be the result of a miscalculation by the commercial advisers of the company, and the company would be in no worse position than if they had made an improvident bargain with regard to the price at which they might buy their coal or with regard to any other contract of real importance. All that is one of the risks which has to be run by a concern carried on for the purpose of profit. In my judgment it would be an extraordinary extension of this doctrine of ultra vires or repugnancy to say that in such a case as this a commercial undertaking was deprived of its ordinary discretion as to fixing the price at which the services rendered or the commodities supplied should be rendered or supplied.

Appeal allowed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for J. Ernest Jarratt, Town Clerk, Southport.*

Solicitor for respondent: *Sydney Morse.*

W. I. C.

In re PENNINGTON AND OWEN, LIMITED.

C. A.
1925
July 27.

[00601 of 1921.]

Company — Winding Up — Liquidator — Retainer — Set-off — Debt owing by Company—Debt owing by Partnership Firm of which Creditor a Member.

In the winding up of a company the liquidator sought to set off against a debt due by the company to a creditor a debt alleged to be due to the company by a partnership firm of which the creditor was a member:—

Held, that alleged debt of the partnership firm being a joint and not a joint and several debt could not be set off against the separate debt due by the company to the partner.

Principle laid down in *Cherry* v. *Boultbee* (1839) 4 My. & Cr. 442, 447, as explained by Cozens-Hardy M.R. in *Turner* v. *Turner* [1911] 1 Ch. 716, 719, held inapplicable to such a case.

Decision of Eve J. reversed.

Appeal from a decision of Eve J.

Pennington and Owen, Ld., was incorporated in 1920 with a capital of 125,000*l.*, divided into 75,000 participating preference shares of 1*l.* each and 50,000 ordinary shares of 1*l.* each. The only shareholders of the company were P. S. J. Owen and L. T. M. Pennington, the former being the registered holder of 5000 participating preference shares and the latter the registered holder of 50,000 similar shares.

At a board meeting held on March 10, 1920, a resolution was passed that a call of 5*s.* per share should be made on the shares allotted to Pennington and Owen respectively.

By art. 14 of the articles of association of the company it was provided that a call should be deemed to have been made at the time when the resolution of the board authorizing such call was passed.

Notwithstanding this call Owen had not paid the amount called up or any part thereof, and there was still due and owing from him in respect of such call of 5*s.* per share the sum of 1250*l.*

On October 25, 1921, an order was made to wind up the company, and on March 13, 1922, a liquidator was appointed.

Before the order to wind up was made a judgment had been

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obtained by Owen against the company for 5816*l.* 7*s.* 8*d.* for unpaid salary as managing director and damages for breach of his service agreement.

On February 17, 1925, proof of this debt was ordered by the Court to be admitted in the winding up for the full amount.

On February 20, 1925, Owen executed an assignment of his debt of 5816*l.* 7*s.* 8*d.* in favour of M. Dunn, Ld., subject to a charge for 800*l.*, which he had previously given to Messrs. Kenneth Brown, Baker, Baker, solicitors.

On March 17, 1925, M. Dunn, Ld., issued the present summons in the winding up for an order that the liquidator should pay to them, as assignees of Owen, the amount of the debt due by the company to him.

In opposition to the summons the liquidator filed an affidavit, in which he alleged (inter alia) that Owen formerly carried on business in partnership with Pennington; that the partnership was dissolved by an order of the Court on September 28, 1921; and that before such dissolution and the order to wind up the company, the company had had dealings with the partnership, as a result of which there was at the date of the winding up due from the partnership to the company the sum of 4702*l.* 15*s.* 2*d.*, the whole of which sum was still due and owing. He further alleged that the liabilities of the company, so far as he had ascertained, including the estimated costs and expenses of winding up, amounted to the sum of 21,780*l.* or thereabouts, which, so far as he was able to judge at present, would necessitate a further call of 5*s.* 1*d.* per share to be made, making a total with the call already made of 10*s.* 1*d.* per share, of which the whole—namely, 2520*l.* 16*s.* 8*d.*—would be owing from Owen; that on the basis above mentioned there would be due from Owen the sum of 2520*l.* 16*s.* 8*d.* against his proof for 5816*l.* 7*s.* 8*d.*, leaving a balance on such proof of 3295*l.* 11*s.* As against that balance there was the 4702*l.* 15*s.* 2*d.* due from the partnership, for which Owen was liable, and, in addition to that, the sum of 800*l.*, with possibly a further sum for costs, charges and expenses due to Messrs. Kenneth Brown, Baker, Baker.

In these circumstances the liquidator submitted that no order should be made on the summons, at any rate at present.

The summons was heard before Eve J. on July 1, 1925, who made an order declaring that the call made on March 10, 1920, of 5*s.* per share on Owen's shares and any calls payable prior to and in the course of the winding up of the company on such shares must be set off against the claim of the applicants as assignees of the amount of the debt due by the company to Owen, and that the Court did not think fit to make any further order on the application, except that the applicants' costs of the application should be taxed and the amount of the costs when taxed should be added to the amount of their claim.

M. Dunn, Ld., appealed from the latter part of Eve J.'s order. The appeal was heard on July 27, 1925.

Clayton K.C. and *St. John Field* for the appellants. Eve J. was wrong in refusing to make the order for payment asked. It is admitted that the liquidator is entitled to set off against the debt due to Owen all calls that are now due and owing or which may subsequently be made in the winding up. All the necessary conditions have been fulfilled entitling the appellants as assignees of Owen to payment of the debt. The liquidator is seeking to set off a joint debt against a separate debt, which cannot be done. He alleges that there is owing to the company by the partnership of which Owen was a partner a debt of 4702*l.* 15*s.* 2*d.*, and claims to set it off against the debt owing to Owen by the company. This partnership debt is joint and not joint and several: Partnership Act, 1890, s. 9, and therefore cannot be set off against the separate debt owing by the company to Owen. The bankruptcy rules as to set-off apply: Companies (Consolidation) Act, 1908, s. 207.

It is, however, contended by the liquidator that by some extension of the doctrine of *Cherry* v. *Boultbee* (1) such a set-off may be allowed. The dictum in that case has been

(1) 4 My. & Cr. 442, 447.

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recognized as applicable in the case of a legacy. A legatee who was a debtor to the estate was there treated as having in his hands part of the testator's estate. It was not a case of set-off at law, and has no application to the present case. In *Turner* v. *Turner* (1) it was sought to extend the principle so as to enable executors to retain a legacy against a debt owed by a partnership of which the legatee was a partner, but the Court refused to allow such an extension. That decision governs the present case.

B. A. Hall for the liquidator. It is admitted that unless the principle of *Cherry* v. *Boultbee* (2) is applicable or can be extended so as to include the case where it is sought to set off a joint debt against a separate debt the liquidator cannot succeed. It is submitted, however, that this is a case in which the principle of *Cherry* v. *Boultbee* (2) ought to be stretched to its utmost limit. The company has debts, ten-elevenths of which will have to be paid by Pennington and one-eleventh by Owen. The principle was applied in *In re Akerman* (3) to the case of statute-barred debts. In *In re Rhodesia Goldfields* (4) it was held that where a fund was being distributed by the Court, a trustee-beneficiary against whom proceedings were pending for moneys alleged to belong to the fund could not take any share until the amount (if any) due from him had been ascertained and made good. That case is applicable to the present. Here there is a fund which is being administered by the Court in the winding up of the company, and a contributory to that fund ought not to be allowed to receive any payment out of it until he has contributed what he owes to it: see also *In re Jewell's Settlement.* (5) When once there is a liquidation the company is in a different position to that which it formerly occupied: Companies (Consolidation) Act, 1908, ss. 123, 125. There is then a fund to which the principle of *Cherry* v. *Boultbee* (2) can be applied.

Turnbull for the respondent Pennington, who had obtained

(1) [1911] 1 Ch. 716.
(2) 4 My. & Cr. 442, 447.
(3) [1891] 3 Ch. 212.
(4) [1910] 1 Ch. 239, 246.
(5) [1919] 2 Ch. 161.

leave to attend the proceedings. It is submitted that the fact that the debt due from the partnership firm is joint does not exclude the application of the principle of *Cherry* v. *Boultbee*. (1) One joint partner can be sued: Halsbury's Laws of England, vol. xxii., p. 45, § 81.

POLLOCK M.R. This appeal must be allowed. It raises a short but an important point. The position is this: The appellants, as the assignees of one Owen, ask that a debt owing to him, the proof of which has been ordered by the Court to be admitted in the winding up of the company for the sum of 5816*l.* 7*s.* 8*d.*, should be paid to them by the liquidator. What the liquidator says is: I am not going to pay to the assignees of Owen until I have received a debt which is due to the company. The debt that he seeks to recover is not one due from Owen, but due from Pennington and Owen, who were partners, and the liquidator says that he is entitled to withhold the payment of this established debt of 5816*l.* 7*s.* 8*d.* until in some way the partnership has paid that debt, because Owen was one of the members of that partnership. The liquidator would be entitled to deduct from that debt due to Owen sums due from Owen to him as liquidator, for instance, in respect of calls upon shares made before the commencement of the liquidation in respect of which there is a direct liability of Owen to the liquidator; but the appellants are quite willing to provide and to undertake that those calls shall be deducted, and, more than that, they have assented to all calls, whether made before or in the course of the liquidation, being treated as owing from Owen and provided for before the sum is paid over to them. The assignment by Owen to the appellants provides also for the payment of a sum of 800*l.* owing by Owen to the solicitors, Messrs. Kenneth Brown, Baker, Baker, but the appellants say that they are quite satisfied to receive the sum paid by the liquidator subject to that payment. But what they say they do not assent to is that there should be a set-off, as it is rather roughly and imperfectly called, of a debt which is

(1) 4 My. & Cr. 442, 447.

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alleged to be due to the liquidator from the partnership firm of Pennington and Owen.

Eve J., although all the facts were before him, was minded not to assent at the present time to the application of the appellants; but Mr. Hall has very frankly admitted that the debt of 5816*l.* 7*s.* 8*d.* has been duly established, that all conditions have been fulfilled for the purpose of that sum being paid over, and that it ought to be paid over unless he can apply the principle which has been laid down in *Cherry* v. *Boultbee.* (1) That principle has been applied in a number of cases, but perhaps the best statement of it is to be found in *Turner* v. *Turner* (2), where Cozens-Hardy M.R. said (3): "I think that the more logical and correct mode of explaining that doctrine is this: You, the debtor, have in your hands part of the assets of the testator and you cannot claim any part of the assets of the testator, out of which of course your legacy must be paid, without bringing into the estate that portion which is now in your pocket; or, in other words, your legacy must be treated as paid pro tanto out of the assets of the testator which you have in your pocket." Now, it will be observed that this doctrine of restoring to the mass a sum which is due from a debtor before the debtor is entitled to receive any sum out of that mass, be it by way of legacy or possibly otherwise, is applied only where there is a direct and specific mutuality between the mass and the particular debtor. It does not apply to the case in which the liability is to pay a particular person, and the attempt is made before payment over to require a sum to be paid which is owing not from that particular person but from that particular person and another, as in the case of a partnership debt.

Now we have been referred to a number of cases, but it all comes back to this point, that in *Kendall* v. *Hamilton* (4) it was determined that partnership debts were not joint and several, but were joint only, although in the case of a deceased partner there was a right as against his estate. By s. 9 of the Partnership Act, 1890, it is declared that every partner

(1) 4 My. & Cr. 442, 447.
(2) [1911] 1 Ch. 716.
(3) [1911] 1 Ch. 719.
(4) (1879) 4 App. Cas. 504.

in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner.

What the liquidator is seeking to do in the present case is to set off the sum in question or to withhold payment of it from Owen until a sum which is alleged to be due from the partnership of Pennington and Owen to the company has been paid to him. It appears to me that the doctrine of *Turner* v. *Turner* (1), explaining *Cherry* v. *Boultbee* (2), does not apply to such a case. It is impossible to stretch such a doctrine, as we have been invited to do, until some loose principle of what may be called rough justice is applied as between the liquidator and two persons: the right of Owen and his assignees is to be paid this sum. Applying the doctrine which does apply, that of mutual dealings—contained in s. 31 of the Bankruptcy Act, 1914, which applies only to dealings between the same parties—a joint debt cannot be set off against a separate debt nor a separate debt against a joint debt, and what we are here really asked to do is to withhold the payment of a separate debt due to one person until a joint debt has been collected from that person and another. In my judgment, inasmuch as all conditions have been fulfilled showing that there is this sum of 5816*l.* 7*s.* 8*d.* due to Owen, his assignees have a right to have it paid to them subject to the deductions to which they assent in respect of calls due and to be made, or to fall due, and to payment to the solicitors, and there is no right to withhold that sum until another debt, due from quite a different entity, has been paid over into the liquidator's hands.

The appeal will therefore be allowed with costs, and an order must be made for payment of the sum.

WARRINGTON L.J. I am of the same opinion. The company in liquidation is a company, the name of which is Pennington and Owen, Ld. It is a private company, which consists of two shareholders, one Pennington and one Owen. Pennington is the holder of 50,000 out of the 55,000 shares which have been issued, and Owen is the owner of the

(1) [1911] 1 Ch. 716. (2) 4 My. & Cr. 442.

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remaining 5000. So far, therefore, as contributions to the fund for payment of the debts of the company are concerned, Pennington is a very much larger contributor than Owen. I mention these facts not because I think they are material, but because an argument was founded upon them and was addressed to us, and because Eve J. appears to have considered them of importance in the relations between Pennington and Owen.

Now the material facts upon which this case must, I think, be decided are these: By an order made in the winding up on February 17, 1925, a proof of a debt of 5816*l.* 7*s.* 8*d.* due from the company to Owen was allowed in full. For the present purposes, therefore, it is established that the company owes Owen 5816*l.* 7*s.* 8*d.* Owen assigned that debt to the appellants, subject to a prior charge in favour of certain solicitors, and, as is now conceded, it was also to be subject to any sums due from Owen to the company in respect of calls owing before the winding up and in respect of his liability to contribute as a member of the company. Then an application was made by the appellants for payment of the debt. The liquidator, by his affidavit filed in opposition to the summons, alleged that there was a debt owing at the date of the winding up by the partnership firm of Pennington and Owen to the company, amounting to 4702*l.* 15*s.* 2*d.*, exceeding, with the deductions, which admittedly would have to be made, any sum which would be payable to Owen in respect of the debt of 5816*l.* 7*s.* 8*d.*, and therefore he resisted the order for payment of that debt or any part of it out of the assets to Owen's assignees. The learned judge refused to make the order. Now it is a little difficult to understand on what grounds the learned judge did refuse to make the order. Of course, the claim set up by the affidavit of the liquidator is, at first sight, a hopeless one, because it is a claim to set off against a debt due to one person separately a debt due from that person and another person jointly. But there seem to have been referred to before the learned judge, and there have been referred to before us, cases in which it has been held that where the Court is administering a fund

and finds that a person who is entitled to receive a part of that fund is also indebted to the fund, he must be taken to have in his hands so much of what is due to him from the fund as he owes to the fund and, therefore, he cannot while he retains that part of the fund in his hands, call upon those who have the distribution of the fund to pay anything more than the difference between what he is entitled to and what he owes them. That principle is perfectly well established, and there is no question about it; but that principle does not apply to a case like the present. The point is expressly decided in *Turner* v. *Turner* (1) by this Court, consisting of Cozens-Hardy M.R., Fletcher Moulton and Buckley L.JJ., and the decision in that case was that "The principle that a legatee who is indebted to the testator's estate can receive nothing from the testator's bounty until he has brought into account the amount due in respect of the debt does not apply where the debt is owed by a partnership of which the legatee is a member." Therefore even if this was a case—which in my opinion it is not—in which the principle, which has been generally referred to as the principle of *Cherry* v. *Boultbee* (2), would otherwise be applicable, it would not be applicable in the present case, because the debt which it is alleged that Owen owes, for it has not yet been established, is a debt which he owes with another person jointly, whereas that which he is entitled to receive he is entitled to on his own account and for his own account alone. What Fletcher Moulton L.J. says is (3): "It is clear to me that there is no power in an executor to retain a legacy to one partner of a firm in virtue of a partnership debt to the estate. I can see no authority and no justification or reason for the contrary doctrine. I fully accept the explanation of the case of *Smith* v. *Smith* (4) which the Master of the Rolls has given, and so interpreted it may have been correctly decided, but certainly it gives no justification for the principle contended for by Mr. Levett of setting off individual legacies against partnership debts." The principle could not be put shorter

(1) [1911] 1 Ch. 716.
(2) 4 My. & Cr. 442, 447.
(3) [1911] 1 Ch. 716, 722.
(4) (1861) 3 Giff. 263.

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or more plainly than that. Therefore, those cases have nothing to do with the present case. I rather gather from the note of Eve J.'s judgment that what he thought he ought to do was to refrain from making any order for payment to Owen's assignees until the position of the accounts between Owen and his partner Pennington had been ascertained. With all due respect to the learned judge, I fail to see how the state of the accounts between the two joint debtors can have any bearing at all on the question whether the joint debt can be retained as against the separate debt. In administering the affairs of the company in the winding up the Court has nothing to do with the possible claims which one member of the company may have against another member. That is quite immaterial for the purpose of the administration of the assets of the company, and therefore it seems to me that the only thing the learned judge had to determine was: Had the company a right to set off the joint debt alleged to be due to it from the partnership against the separate debt proved to be due to Owen from the company? In my opinion there is no such right, and the learned judge had no alternative but to make the order which he was asked to make, which would involve the payment of the ultimate balance of the debt to the appellants after discharging the prior charges.

Appeal allowed.

Solicitors for appellants: *Woolfe & Woolfe.*
Solicitors for respondents: *Le Brasseur & Oakley.*

W. I. C.

Applied. In re DEBTOR, NO. 21 OF 1950 (NO. 2) [1951] 1 Ch. 612

KNIGHT *v.* KNIGHT.

[1924. K. 318.]

C. A.
1925.
Mar. 25, 26.

Practice—Costs—Money paid into Court—Plaintiff's Action in Part dismissed—Set-off of Defendant's Costs—Plaintiff's Solicitors' Charging Order on Sum paid in—Plaintiff's unsuccessful Appeal—Defendant's Costs of Appeal—Priorities—Solicitors Act, 1860 (23 & 24 *Vict. c.* 127), *s.* 28—*Rules of the Supreme Court*, 1883, *Order* XXII., *rr.* 5, 6 (c); *Order* LVIII., *r.* 4, *Order* LXV., *r.* 14.

There is no general right to a set-off of the respondent's costs of the plaintiff's unsuccessful appeal against money paid into Court by the defendant in the action and recovered by the plaintiff in respect of a claim not the subject of the appeal, and upon which money, subject to the set-off of the defendant's costs of action ordered by the Court below, the plaintiff's solicitor had obtained a charging order.

The Court of Appeal has a discretion under Order LVIII., r. 4, as to the costs of the appeal, and the charging order having been properly obtained, the Court, in the exercise of that discretion, gave effect to the lien by ordering the costs of the appeal to be set off against the residue of the money in Court remaining after satisfaction of the charging order.

UPON the hearing of this appeal from Romer J. a question of priorities as between the respondent's costs of the plaintiff's unsuccessful appeal and a solicitor's charging order for costs in the Court below arose in the following circumstances :—

In the action the plaintiff had claimed a declaration of partnership, consequential accounts and inquiries, and a receiver and manager, and there was an alternative claim for money lent. The defendant denied a partnership, but paid 1000*l.* into Court in respect of money lent and in full satisfaction of the plaintiff's alternative claim. Romer J. dismissed the plaintiff's action in respect of a partnership, and under his order, drawn up on December 19, 1924, there were certain costs to be paid by set-off against the sum of 1000*l.* paid in and recovered by the plaintiff. On February 24, 1925, the plaintiff's solicitor obtained a charging order upon the balance of the sum paid into Court as being " property recovered or preserved " under s. 28 of the Solicitors Act, 1860. The plaintiff appealed against the order dismissing his action for a declaration of partnership, and before the appeal was heard he changed his solicitor. His appeal was

C. A. 1925. KNIGHT v. KNIGHT.

dismissed with costs, and it was then asked that the respondent's costs of the appeal should be included among the costs which were to be set off against the 1000*l.* recovered by the plaintiff in the action, and in priority to the charging order.

The appeal was heard on March 25 and 26, 1925.

The *Appellant* appeared in person.

Hughes K.C. and *W. A. Barton* for the respondent. An appeal is only a step in the same action, and therefore Order LXV., r. 14, applies to the costs of an appeal, notwithstanding the solicitor's lien. Until the action is completely disposed of, the money paid into Court is the property of the defendant, who has a general right of set-off.

[POLLOCK M.R. referred to *Westacott* v. *Bevan* (1) and *Cole* v. *Eley*. (2).]

Those were cases of actions only, and not of costs of an appeal, but there is no reason why there should not be a set-off of the costs of an appeal. The solicitor only gets a charging order on what is coming to his client after every proper set-off has been made.

The old views as to the sanctity of a solicitor's lien no longer obtain: per Younger J. in *Puddephatt* v. *Leith* (*No.* 2) (3), following *Reid* v. *Cupper* (4); and Order XXII., r. 6 (*c*), under which, we submit, this case falls, provides that money paid into Court shall not be paid out until after taxation of the costs of the action, and the plaintiff can hardly claim moneys without paying the costs of the appeal. There is a debt due from the plaintiff to the defendant in respect of the costs of appeal, and it is not easy to see why, in those circumstances, the defendant should be made to pay the costs of the plaintiff's solicitor.

POLLOCK M.R. We cannot accede to Mr. Hughes's application. The situation is this: Judgment was delivered by Romer J. on December 19 last year. Under his order there

(1) [1891] 1 Q. B. 774.
(2) [1894] 2 Q. B. 180, 350.
(3) [1916] 2 Ch. 168, 180.
(4) [1915] 2 K. B. 147.

were certain costs to be paid by set-off against the sum of 1000*l.* which was recovered by the plaintiff in the action. That sum was paid into Court by the defendant in a manner which I confess at first sight looks to me embarrassing. It was paid into Court "in full satisfaction of all the plaintiff's claims in this action and as money advanced to her." The plaintiff's claims in the action included claims to have a declaration that there was a partnership between the parties and consequential accounts, but the defendant said that the money which had been found by the plaintiff was advanced only as a loan. If the defendant is to get the advantage of having paid the money into Court it seems to me that it was paid into Court as an admission of liability that it was advanced to her in respect of a loan. However, I need not decide the effect of that plea in the defence. It appears to me that the learned judge was perfectly right in the order which he made and which involved the set-off of certain costs against that sum.

On February 24 the solicitor for the plaintiff obtained an Order, under s. 28 of the Solicitors Act, 1860, giving him a charge upon the balance of the sum which had been paid into Court. [His Lordship read s. 28 and continued:] The solicitor took the appropriate proceedings and obtained his charging order upon the sum which had been paid into Court and which was "property recovered or preserved": see *Emden* v. *Carte.*(1) With regard to such matters it is to be remembered that the amount that is recovered or preserved is the balance which is recovered or preserved in the suit. That I think was determined in a case where there was a claim and counterclaim: *Westacott* v. *Bevan* (2); and the same effect is derived from *Cole* v. *Eley.* (3) More than that, it has been determined by Younger J. in *Puddephatt* v. *Leith* (*No.* 2) (4), that a set-off may arise not merely in matters comprised in one action, but may arise in matters which are brought before the Courts in independent actions in the two Divisions if the proceedings could have been brought and dealt with in one action

(1) (1881) 19 Ch. D. 311.
(2) [1891] 1 Q. B. 774.
(3) [1894] 2 Q. B. 180, 350.
(4) [1916] 2 Ch. 168.

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by means of claim and counterclaim. That decision followed the case of *Reid* v. *Cupper* (1), in which there was a set-off in the case of two several actions. All that is very true, but Mr. Hughes asks us to make a special order that the costs of the appeal, in which his client has succeeded, should be included among the costs which are to be set off against the 1000*l.* which has been recovered by the plaintiff in the action. I do not assent to his view as to there being a general right of set-off. An order of that nature is not infrequently made, but it is not as of course or of general right. It is to be observed that between the hearing of the appeal and the decision by Romer J. the plaintiff's solicitor's rights have accrued and have become crystallized under the actual order of the Court made under s. 28. More than that, the defendant's solicitors did not apply to this Court for any security for costs, although if it could have been shown to the Court that there was no possibility of the plaintiff paying them, and that the money which had been recovered was used up in the set-off which had been ordered plus the solicitor's charging order, it might have been possible for an order for security to be made in this Court. That course was not adopted. Now it is said that we ought to treat the costs of this appeal as falling to be part of the costs of the set-off and to be deducted from the money which has been recovered or preserved. It appears to me that the costs of the appeal stand on a different footing from the costs of the action in which the money was recovered or preserved and which are now charged to the solicitor of the plaintiff. I do not think therefore that there is a right on the part of Mr. Hughes's client to obtain the order which he seeks.

Then Mr. Hughes says that under the terms of Order XXII., r. 6 (*c*), he has a right to have an order made by virtue of that rule. I do not agree. I think that the money probably was paid into Court under and ought to be subject to Order XXII., r. 5, but whether that be so or not I am satisfied that this matter is a matter of discretion. Order LVIII., r. 4, provides as follows. [His Lordship read the rule and continued :]

(1) [1915] 2 K. B. 147.

Prima facie, therefore, there is a discretion in the Court of Appeal, and I do not see anything in Order XXII., r. 6 (*c*), which makes it impossible for us to exercise our discretion vested in us, more particularly as I think that Order XXII., r. 5, is the rule which applies in the present case. In these circumstances it seems to me that we are not compelled to make the order Mr. Hughes asks for and, exercising our discretion, and of course a judicial discretion, I think that the order ought not to be made. The appeal ought, in my opinion, to be dismissed with costs simpliciter.

ATKIN L.J. This is an application by the respondent that the costs of this appeal be set off against the balance of the sum in Court due to the plaintiff, the unsuccessful appellant. It is an application of a successful respondent that the costs of the appeal should be set off against the residue of money in Court, which under the order in the Court below is to be paid out to the plaintiff, the unsuccessful appellant. The amount was paid in on the plaintiff's claim which, as to the first part of it, claimed the ordinary relief in a partnership action of a declaration of partnership and accounts and a receiver and manager. On that claim it appears to me impossible to pay money into Court as an answer—they are not on the same plane; you cannot pay money into Court in answer to a claim for such relief as that. There was an alternative claim for money lent, which was inconsistent with the partnership claim. Upon that the defendant said that the sum of 1000*l.* was money lent, and she brought that sum into Court in full satisfaction of all claims in the action, which must be taken to mean in satisfaction of the alternative claim which the plaintiff made. It seems to me that that payment comes under the terms of Order XXII., r. 5. The importance of it is that Mr. Hughes claims that this payment was made under the terms of Order XXII., r. 6, and in accordance with that rule the order for payment out shall not be made until after payment of the costs of the action, and the money shall then be paid out after setting off damages and costs.

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To my mind it was not paid in under r. 6; therefore that does not apply. Secondly, if it did apply, the costs of the appeal are not costs of the action, therefore that rule does not apply to such costs as the Court of Appeal chooses to order.

In the meantime the solicitor for the plaintiff had obtained a charging order for his costs over the residue of the same money which is in Court and which has been ordered to be paid out to the plaintiff after providing for the costs of the action. I myself have no doubt at all that this Court has discretion to order the costs of the appeal to be set off against that residue so as to defeat the solicitor's lien but, in the circumstances of this case, I can see no reason why they should. The plaintiff has changed his solicitor; the solicitor therefore has not had the opportunity of pursuing the appeal at all. There has been no undue haste to snap that lien, because the judgment was drawn up on December 19, the summons for the lien was not taken out until January 16, and the order was not made until February 24, which happens to be the day on which the notice of appeal was given. I think that the Court would be right in giving effect to this lien, and that the right order to make is that the costs of the appeal should be set off against the residue of the amount in Court remaining after satisfaction of the charging order. That I think would be perfectly right, and to that extent I think the defendant should be protected.

SARGANT L.J. I agree with the order proposed by Atkin L.J. and with the reasons that he has given in his judgment.

Solicitors for respondent: *E. & J. Mote, for Carter & Fisher, Torquay.*

R. M.

EAST RIDING OF YORKSHIRE COUNTY COUNCIL *v.* THE COMPANY OF PROPRIETORS OF SELBY BRIDGE.

RUSSELL J.

1925

June 10, 11, 29.

[1924. Y. 149.]

Highway—Ferry—Substitution of Bridge and Approaches for Ferry and Approaches—Right of Access to Approaches—Selby Bridge Act, 1791 (31 *Geo.* 3, *c. lx.*)

Before 1791 an old highway from London to York crossed the Ouse at Selby by means of a ferry. In 1791 the Selby Bridge Act was passed. After reciting that the building of a bridge near the ferry would be of great public utility, and that the persons named were willing to build a bridge at their own expense and to compensate the owner of the ferry rights, the Act authorized the incorporation of the said persons as the Company of Proprietors of Selby Bridge, empowered them to build a bridge near the ferry with proper approaches, which were to all intents and purposes to be considered part of the bridge, and to charge tolls to all persons crossing the bridge. Under the Act the ferry rights and the soil of the approaches were vested in the company. The company claimed that the approaches were their private property and that without their permission no one was entitled to be on them except for the purpose of crossing the bridge:—

Held, that the Act substituted one highway for another. The old highway consisted of the approaches to the ferry plus the passage across the river. The new highway consisted of the approaches to the bridge plus the bridge. The plaintiffs, being owners of land adjoining an approach, and all persons lawfully entering upon or leaving such land, were entitled to free access to it over the approach.

WITNESS ACTION.

One of the roads leading from London to York passes through Selby. At Selby the road crosses the Ouse to Barlby by means of a swing bridge, the property of the defendants, whose title was acquired in 1791 under the Selby Bridge Act (31 Geo. 3, c. lx.), enacted for the purpose of substituting a bridge for the ferry as a means of passage across the river. The material parts of the Act are as follows: It recites that the building of a bridge near the ferry will be of great public utility, that Lord Petre is seised in fee simple of the ferry and the landing places on both sides, and that persons thereinafter named are willing at their own costs to build a bridge over the Ouse near the ferry and that Lord Petre has consented to give up his rights in the ferry

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for the recompense thereinafter mentioned. Then follow the enacting sections, which so far as material consist of the following provisions. By the first section the persons named are incorporated as the Company of Proprietors of Selby Bridge. By s. 2 the company is empowered to build a bridge near the ferry over the Ouse and to make a proper approach to the bridge on each side; "such approaches, not exceeding the distance of 200 yards therefrom, shall, to all intents and purposes, be considered as part and parcel of the said bridge." For the purposes aforesaid, the company was authorized (inter alia) to alter any highways or make any new roads leading to the bridge not exceeding forty feet. By s. 40 it is provided that the bridge and approaches should be vested in the company and by the same section power is conferred on the company to take for pontage, as or in the name of a toll or duty before any passage over the bridge should be permitted, in lieu of tolls over the ferry the several sums therein mentioned. By s. 48 the rights of the ferry are vested in the company. By s. 52 it is provided that if and when the bridge becomes impassable the company shall provide a proper and convenient ferry. Sect. 69 saves all rights.

By 1891 some houses had been built at Barlby on the York side of the bridge abutting on the approach with entrances leading on to it. Subsequently more houses were built, and by 1908 a large number of houses fronting and opening on to the approach (called Victoria Avenue) on the east side, and fronting on to Thomas Street and George Street (which lead into Victoria Avenue), had been built. Barlby was rapidly growing. Between 1913 and 1917, the number of houses was about trebled. The west side of Victoria Avenue along the approaches was filled with houses opening on to it and side streets of houses were built opening into it on the west side, corresponding to Thomas Street and George Street on the east. With this rapidly growing population, educational needs arose. Accordingly the plaintiffs acquired a piece of land abutting on Victoria Avenue within the two hundred yards approach for the purpose of erecting thereon a school for the education of the Barlby children. They have

erected such a school, but the defendants, the Company of Proprietors of Selby Bridge, advanced the following claim—namely, that Victoria Avenue, for a distance from the bridge of two hundred yards, is their private property from which they have the right to exclude all persons who do not go thereon with the intent of crossing the bridge and paying the proper toll.

Thereupon this action was brought by the plaintiffs, who asked for a declaration that, as owners of a parcel of land adjoining the approach, they were entitled to free and unimpeded access to and from the said parcel over the approach and that toll free, except only for right of passage over Selby Bridge if and when they exercised such right of passage.

The defendants counterclaimed, and asked for a perpetual injunction restraining the plaintiffs, their officers, servants, agents, and workmen, from trespassing on the "approach," the land of the defendant company.

Maugham K.C. and *F. E. Farrer* for the plaintiffs. The owner of land adjoining a highway has a right of access to it from any part of his land adjoining the way. This is a private right distinct from the right to use the highway as one of the public: Pratt and Mackenzie's Law of Highways, 17th ed., p. 151. "The same principle which compels us to call a bridge, or a river, a common highway, applies to a ferry, for it is a common passage, which is no more than a common highway": Woolrych's Law of Ways, 2nd ed., p. 363; *Pain* v. *Patrick* (1); *Letton* v. *Goodden*. (2) A ferry may be regarded as a link between two highways on either side of the water or as part of a continuous highway crossing the water: per Lord Parker in *Hammerton* v. *Earl of Dysart*. (3) The Selby Bridge Act substituted one highway for another—namely, the bridge and its approaches for the ferry and its approaches. There is the same right of access to the new approaches as there was to the old. It makes no difference that the Act vests the approaches in the defendants. In considering the question

(1) (1690) 3 Mod. 289. (2) (1866) L. R. 2 Eq. 123, 130.
(3) [1916] 1 A. C. 57, 79.

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of right of access the question of the ownership of the soil is immaterial. Just as adjoining owners had a right of access to a turnpike road so here the plaintiffs have a right of access to the approach.

Bennett K.C. and *W. Copping* for the defendants. The Selby Bridge Act entitled the company to build a bridge, with approaches not more than two hundred yards long, near the ferry. The approaches were to be vested in the company and were to be considered part and parcel of the bridge.

The company was authorized to charge tolls for pontage in lieu of tolls over the ferry. An owner who dedicates land to the public as a highway does not thereby relinquish his property in the soil, and the same is true of roads constructed or maintained under Turnpike Acts: *Davison* v. *Gill.* (1) But here the soil of the approach is not only vested in the defendants but the approach is declared to be to all intents and purposes part of the bridge. In these circumstances on the fair construction of the Act the bridge and its approaches have been substituted for the ferry boat and are the private property of the company. Just as the owner of the ferry could exclude from the ferry boat any person not intending to cross the river on payment of toll, so the company are entitled to exclude from the approach, apart from any easements that may have been acquired, all persons who do not intend to cross the bridge on payment of toll.

RUSSELL J. The defendants claim that the road to York for a distance of two hundred yards from the York side of the bridge is their private property and that they have a right to exclude from access to it all persons except such as go thereon with the intent of crossing the River Ouse and paying toll. The defendants in this action limit their claim to the approach on the York side of the bridge, but it is difficult to appreciate why their claim, if valid, is not equally valid as to the approach on the Selby side of the bridge. The title of the defendants to the bridge is founded on the Act,

(1) (1800) 1 East, 64, 69.

31 Geo. 3, c. lx. At that date, 1791, there existed a ferry over the Ouse from Selby in the West Riding to Barlby in the East Riding, that is to say, the way from London to York ran at this point along the approach to the ferry in the West Riding, across the river, along the approach to the ferry in the East Riding, and thence along the road to York.

It is conceded by the plaintiffs, for the purposes of this action, that the approach on the York side of the Ouse was made by the defendants to the full extent of two hundred yards. The defendants' claim appears to me startling. It remains to be seen whether, though startling, it is well founded. The answer seems to me to depend, in the first instance, on the question whether the approach is or is not a highway. The defendants say that the approach in question is by the Bridge Act vested in them. This is undeniable. But the approach may be vested in them and yet be a highway. This they concede; but they further argue that the approach is not a highway and for this reason. They contend (and this is the basis of their argument) that by the Act the bridge and its approaches are substituted for the ferry boat, and that just as the former owner of the ferry was entitled to exclude from the ferry boat any person not intending to cross the river in it, and pay the appropriate toll, so they are entitled to exclude from the approach any persons not intending to cross the bridge and pay the appropriate toll. According to the defendants' contention no Barlby child may (except with their permission and on such terms as they may dictate from time to time) enter or leave the plaintiffs' school by the approach road. The short answer is that the basis of the contention has no foundation.

From a perusal of the Act, it is in my opinion manifest that the bridge was a substitute in all respects for the ferry: and that if the way leading from Selby to York across the ferry was a public highway, the substituted way was no less a public highway.

That the old way across the ferry was a highway is clear from the following citation from Woolrych's Law of Ways, 2nd ed., p. 363: "The same principle which compels us to

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call a bridge, or a river, a common highway, applies to a ferry, for it is a common passage, which is no more than a common highway." To this may be added Lord Parker's statement in *Hammerton* v. *Dysart* (1): "A ferry may thus be regarded as a link between two highways on either side of the water, or as part of a continuous highway crossing the water."

The Bridge Act substitutes one highway for another highway. The old highway at the material point consisted of the approaches to the ferry, plus the passage across the river. The substituted highway consists of the approaches to the bridge, plus the bridge. The ferry boat was only a physical means by which the passage along the highway across the river could be effected. The old approaches were highways to which adjoining owners would be entitled to access from their adjoining land. The substituted approaches are highways to which adjoining owners have similar rights of access. The defendants' claim is accordingly both startling and ill-founded.

The result is that I make the following order. In the action I make the declaration that the plaintiffs as owners of their parcel of land adjoining the approach, and all others lawfully entering or leaving the said parcel, are entitled to free and unimpeded access to and from the said parcel over and along the said approach, and that toll-free, except only for right of passage over Selby Bridge if and when they exercise such right of passage. I grant no injunction, but I give liberty to apply for an injunction if and when occasion arises; and I order the defendants to pay the costs of the action. The counterclaim I dismiss with costs.

Solicitors: *Collyer-Bristow & Co., for J. R. Procter, Beverley; H. J. S. Woodhouse & Co.*

(1) [1916] 1 A. C. 57, 79.

J. B. B. M.

THORN *v.* MADDEN.

TOMLIN J.
1925
July 17.

[1924. T. 1980.]

Landlord and Tenant—Lease—Lessee's Covenant against using the demised Premises for the Purpose of any Trade or Business or otherwise than as a private Dwelling-house—Reception of paying Guests—Breach of Covenant.

By a sub-lease dated April 14, 1921, a dwelling-house in London was sublet for a term of seven years from March 25, 1921, at the yearly rent of 180*l.* The sub-lease contained a covenant "that the lessee his executors administrators and assigns will not at any time during the said term use or permit the said dwelling-house and premises to be used for the purpose of any trade or business whatsoever, ... or otherwise than as a private dwelling-house or professional residence only." The defendant was an assignee of the original sub-lessee, and having taken the house, although it was beyond her means, she made a practice of taking in friends and others as paying guests in order to meet rent, rates and outgoings. These paying guests were either friends or recommended by friends, and were secured by private notification and never by public announcement. In an action by the sub-lessors for an injunction to restrain the defendant from doing this on the ground that it constituted a breach of the covenant:—

Held, that the defendant was committing a breach both of the part of the covenant against using the premises for the purpose of any trade or business and of the part of the covenant against using the premises otherwise than as private dwelling-house or professional residence only, and that an injunction must be granted to restrain the defendant from committing this breach.

WITNESS ACTION.

Lilly S. Thorn and the plaintiffs were, at the date of the sub-lease next mentioned, possessed of the messuage and premises No. 69 Elm Park Gardens, Chelsea, together with the use of the ornamental gardens adjoining called Elm Park Gardens, as joint tenants for a term of ninety-nine years from March 25, 1875, under a lease dated April 28, 1884, containing repairing and restrictive covenants in terms identical with the covenants in the sub-lease.

By a sub-lease dated April 14, 1921, Lilly S. Thorn and the plaintiffs demised to Arthur Hungerford Pollen the messuage and premises, together with the use of the gardens, for a term of seven years from March 25, 1921, at the yearly rent of 180*l.* and 3*l.* for the garden.

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By the sub-lease the sub-lessee covenanted (inter alia) that he, his executors, administrators and assigns "will not at any time during the said term use or permit the said dwelling-house and premises to be used for the purpose of any trade or business whatsoever, ... or otherwise than as a private dwelling-house or professional residence only. . . . ." Lilly S. Thorn died on June 5, 1921, and in April, 1924, Arthur Hungerford Pollen assigned the premises to the defendant for the residue of the sub-term of seven years.

The plaintiffs alleged that the defendant had broken the covenants in the sub-lease (inter alia) by using the premises for the purpose of carrying on the business of a boarding house or of letting lodgings or of receiving lodgers or paying guests, and by using the premises otherwise than as a private dwelling-house or professional residence only. And the plaintiffs claimed an injunction to restrain the defendant "from using or permitting to be used the premises for the purpose of the business of a boarding-house or of letting lodgings and/or of receiving lodgers and/or paying guests or of any trade or business or otherwise than as a private dwelling-house or professional residence only. . . . ."

By her defence the defendant, who was a married woman, admitted that she "for the first time in her life, in order to meet rent, rates and outgoings of the said premises greatly in excess of any sum ever paid for like purpose by her . . . . husband, and incurred through inability to secure a house at less rent on transfer to London from Liverpool, where she formerly resided, on her said husband's change of professional status, and in order to provide against reduction of income and loss through the said change and also her said husband's long illness, has temporarily taken and is taking friends and others as paying guests, who have been secured by private notifications and never by public announcement of the address of the said premises"; and she contended that in so doing she had not committed any breach of the restrictive covenant in the sub-lease.

The case was brought on by the plaintiffs upon this admission, and reliance was also placed on a letter in evidence

dated November 2, 1924, written by the defendant to a gentleman in Liverpool, in which she said :—

"Dear Sir,—I have a few paying guests staying in my house, and as a doctor and his wife leave on Tuesday next, their room will be free for a few days. I would charge 9*s.* 6*d.* each for bed and breakfast; other meals would be provided if required. Will you let me know by return if you would like me to keep the room for you?"

A step-daughter of the defendant gave evidence that it was generally old friends who were received as paying guests, but sometimes a stranger recommended by a friend. The letter in evidence was written to a person not personally known to the defendant. It was unusual to offer to provide bed and breakfast only for a daily sum. The paying guests generally contributed a weekly sum towards the expenses and took their meals with the family. They had about three bedrooms usually available for guests, but in August last there were six or seven paying guests, although that number was somewhat unusual.

Gavin Simonds K.C. and *F. Baden Fuller* for the plaintiffs. The admission of the defendant shows that she has been committing a breach of covenant. The house is not being used as a private dwelling-house, but the tenant makes a profit by letting to a number of persons. In effect she is carrying on a business. There is no distinction in law between an ordinary lodging house keeper and a person who takes a house beyond his means and seeks to increase his income by taking in other persons as paying guests. There is in either case a breach of a covenant not to use or permit the premises to be used for the purpose of any trade or business or otherwise than as a private dwelling-house or professional residence only: *German* v. *Chapman* (1); *Hobson* v. *Tulloch* (2); *Porter* v. *Gibbons & Bisset* (3); compare *Tompkins* v. *Rogers*. (4)

Ross-Brown K.C. and *Nicholas Cockshutt* for the defendant. The defendant is not using the premises otherwise than as

(1) (1877) 7 Ch. D. 271.
(2) [1898] 1 Ch. 424.
(3) (1904) 48 Sol. J. 559.
(4) [1921] 2 K. B. 94.

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a private dwelling-house: *Porter* v. *Gibbons & Bisset.* (1) The defendant is not carrying on a business, for she is not taking in paying guests for profit, but to obtain help in paying the rent and outgoings. This is a case where the defendant, being in a financial difficulty, is supplementing her income by taking in friends for the most part to help in paying the costs of the house. It is not a case where the Court should grant an injunction.

TOMLIN J. This is an action in which the lessees of a house known as 69 Elm Park Gardens, Chelsea, seek to restrain an under lessee from the breach of certain covenants in the under lease. The covenants correspond in all material respects with the covenants in the head lease under which the plaintiffs hold. The plaintiff's lease is for a term of ninety-nine years from March 25, 1875. The defendant is the assignee of a sub-lease, which is dated April 14, 1921, and is for a term of seven years from March 25, 1921. [His Lordship then dealt with two matters in the action not calling for report and continued:] The third matter which gives cause for most consideration is an alleged breach of a covenant as to the user of the premises. The covenant in the sub-lease, which I understand follows the terms of the head lease, is in these terms. [His Lordship read the covenant:] The case has been brought on upon the admission in the defence as to the character of the user of the premises. [His Lordship read the admission:] I have also had my attention called to a letter written by the defendant to a Captain Haworth, near Liverpool, dated November 2, 1924, in these terms: "Dear Sir,—I have a few paying guests staying in my house, and as a doctor and his wife leave on Tuesday next, their room will be free for a few days. I would charge 9*s.* 6*d.* each for bed and breakfast; other meals would be provided if required. Will you let me know by return if you would like me to keep the room for you?" I have also seen in the box the defendant's step-daughter, who lives on the premises, and she has given me some information as to what takes place. She has told

(1) 48 Sol. J. 559.

me that there were as many as six or seven paying guests there in August last, although that number was somewhat unusual. She told me that in November of last year they had four guests : that the number of bedrooms available for guests was about three, and that most of the guests were charged a weekly sum for board and residence; and I gather that they shared the common meals together with the defendant and her family.

I have to determine on those facts whether there is anything being done which constitutes a breach of the restrictive covenant, having regard to the true meaning of the covenant. I must not concern myself with any question of hardship to the defendant, or with such questions as housing shortage or the like. All those matters are irrelevant to the questions which I have to decide, and however much sympathy I may have with the defendant, it remains my duty to construe the document in the same way and arrive at the same conclusion as I should have done if my sympathy had been absent.

I think that, where, as here, a lady is of set purpose occupying a house which she is aware is beyond her means and, for the purpose of supplementing her means and enabling her to live in the house, is securing, to use a neutral term, visitors to come and live there for short or long periods upon payment for board and residence, it is impossible to say that the house is being used as a private residence only. It seems to me to be used by her in precisely the same way as it would be used by one who kept a lodging house or a boarding house (whatever the strict distinction between them may be), although there may be some differences in the actual methods employed. This is not like a case between two friends, when to the one desiring to pay a visit the other says : " I cannot afford to keep you, but I shall be delighted to see you if you will pay." Here what is being done is to keep the house permanently available for the accommodation of any approved person who cares to come and stay there and pay for doing so. I think that such a case as this falls into a different category, and amounts to carrying on a business. It does not seem to me to be a

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necessary quality of a business that it should be advertised in an obtrusive manner or at all. For carrying on a business all that is necessary, I apprehend, is to take the steps required to secure the necessary customers, and I think it is plain from the letter I have read that the defendant takes steps, by the means which she thinks most adequate, to secure customers, when she wants them. Nor, again, do I think it makes any difference that she limits her customers to those of a particular kind, and says: "I will not have anybody here whom I do not know personally or who is not vouched for by somebody I know personally." It is admitted that she seeks to bring within her net her friends and those whom her friends recommend, and in those circumstances such limitation as she puts upon those whom she admits to her house does not seem to me to be a limitation which excludes the transaction from being the carrying on of a business.

In those circumstances I must hold that there has been a breach both of that part of the covenant which relates to using the premises as a private residence only, and of that part which forbids the carrying on there of a business; and it follows, of course, that some form of injunction must be granted. But it seems to me a case where nothing ought to be done which is harsh, and I shall safeguard the defendant to this extent: that any injunction I grant will be suspended for such reasonable time as will enable her to readjust her relations with those who are in the house and to make such other arrangements as she may desire.

His Lordship then granted an injunction "to restrain the defendant from using or permitting the said dwelling-house and premises to be used for the purpose of any trade or business or otherwise than as a private dwelling-house," but suspended the injunction, so far as the retention of the existing guests was concerned, over September 29, 1925.

Solicitors: *Holt Beever & Co.; Slaughter, Colegrave & Cockshutt.*

H. C. G.

In re LLOYD'S FURNITURE PALACE, LIMITED.

EVANS *v.* THE COMPANY.

[1922. L. 3018.]

ROMER J.

1925

Jan. 27; *Feb.* 10, 12; *March* 10.

*Fraudulent Preference—Company agree to issue Debentures as Security for Loans—Delay in issuing Debentures in order to maintain Company's Credit—Issue of Debentures—Company compulsorily wound up—Validity of Debentures—*13 *Eliz. c.* 5.

Where a company agrees to issue debentures to a creditor as security for past and future loans, but delays issuing them for a considerable time in order to retain its credit with its other creditors, the debentures are not voidable under the statute 13 Eliz. c. 5, when the company goes into liquidation.

THE following statement of facts is taken from his Lordship's written judgment:—

This is a summons by the liquidator of the company, asking that the master's certificate under the judgment in an action brought to enforce certain debentures issued by the company may be discharged or varied by disallowing the whole of the sum thereby certified to be due to the plaintiff, Joseph Evans, for principal and interest. The summons has, in fact, been issued for the purpose of raising the question as to whether the debentures are not void as against the liquidator under the statute 13 Eliz. c. 5.

The defendant company were not in liquidation at the date when the judgment was pronounced, and consented to such judgment without raising any question as to the validity of the debentures. The judgment, however, contains no declaration of charge and the liquidator is not precluded from raising the question now. The facts are as follows: The company was incorporated under the Companies Acts on March 19, 1917, with the object of carrying on the business of manufacturers of and dealers in household and other furniture. The business in fact carried on by the company, from the date of its incorporation until the date of its liquidation, consisted in the sale as retailers to persons in Pontypridd and other places in South Wales of furniture

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purchased from Evans or companies or firms in which he was interested. Evans was the promoter of the company.

On April 24, 1917, at the statutory meeting of the company Evans and a Mr. Chaundy were appointed the first directors of the company. On the same day, at a meeting of these two gentlemen as such directors, Chaundy was appointed secretary of the company, and a Mr. Newey was appointed an additional director. At the same meeting Chaundy stated that the capital of the company, which was only 1000*l.*, would be insufficient for the working of the business. Evans thereupon stated that he would find the necessary further capital, provided that it was secured in some way, and it was thereupon resolved that debentures should be issued to him as and when he applied for the same. From this date onwards Evans made, or rendered himself liable for, various cash advances to the company, but no debentures were ever issued to him until the month of June, 1922.

The reason for this delay is one that reflects little credit upon either Evans or Chaundy. It is reasonably clear that during the year 1918 and subsequent years the company was in an unsatisfactory financial condition, and found it increasingly difficult to meet its monetary engagements. On January 20, 1919, at a directors' meeting, at which Evans and Chaundy were present, the secretary stated that it was getting increasingly difficult to meet the company's engagements as they became due. The minute of that meeting ends with this statement: "The meeting was of opinion that debentures should be created in order to obtain further advances." I am not sure why this statement was entered in the minutes, because it is clear that neither Evans nor Chaundy intended that any debentures should be issued so long as the company was enabled to obtain goods on credit. And for this reason. Both these gentlemen knew that if debentures were issued they would have to be registered, with the result that other persons would no longer be willing to give credit to the company, knowing that at any moment they were liable to be defeated by an exercise by the debenture holder of his rights.

At a meeting of these two gentlemen on January 14, 1920, Chaundy, after referring to the financial position of the company, expounded his views with regard to debentures and, after this exposition of Chaundy's views, which were to the effect just stated, the meeting decided that, having regard to the detrimental effect an issue of debentures had on small limited companies, " matters should go on as hitherto until circumstances compelled otherwise."

On February 15, 1921, according to the minute of a meeting of these two directors on that date, the financial position was found to be still acute, and the minute states that the manager had been instructed to push the cash sales as much as possible, even though it might ultimately affect the business. Chaundy advocated putting goods into sales in the district with a view to raising capital, and stated that he had made arrangements with several concerns to trade upon bill terms.

It would appear that so far the policy of deferring the issue of debentures to Evans was proving successful. One may doubt whether Chaundy could have made arrangements with any concerns to trade upon bill terms had these concerns known that Mr. Evans held a first charge upon all the assets of the company to secure the moneys for which the company was liable to him.

During the early part of the year 1922 the financial position of the company appears to have gone from bad to worse. On April 4 of that year, at a meeting of directors, at which Evans and Chaundy were present, together with a son of Evans who had been elected a director in February, 1921, it was stated that it had been found necessary, in order to obtain money, to clear out stocks almost without reserve. In this state of things it would seem that the time had arrived when, in the words of the minute of January 14, 1920, " circumstances compelled otherwise," and it would no longer be safe, in Evans' interests, to delay the issue to him of the debentures. Accordingly on May 30, 1922, at a meeting of the same three directors, such issue was resolved upon. The minute of that meeting dealing with the matter is in these terms: " The directors reported that in accordance with

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the resolution passed on April 24, 1917, the company had obtained loans from Mr. J. Evans, aggregating 10,255*l.* to October 31, 1920, and that Mr. Evans was desirous of having security for the amount so advanced. Resolved that the action of the directors be approved and confirmed and that the directors be authorised to issue debentures, or a debenture to Mr. J. Evans for the sum of 10,000*l.* such debenture or debentures to be a floating charge upon the assets and effects of the company and the principal to carry interest at 6*l.* per cent. per annum paid on the usual quarter days, June, September, December and March." In accordance with this resolution, ten debentures, each of 1000*l.*, were issued to Evans on June 19, 1922, and were in due course registered. These are the debentures which Evans is seeking to enforce in this action and the validity of which is challenged by the liquidator.

On November 10, 1922, a creditor named Wood obtained judgment against the company and levied execution. On November 15, 1922, Evans accordingly issued his writ in this action, and on the same day a receiver of the company's assets was appointed by consent. The assets of the company are probably insufficient to pay the moneys due to Evans, though the exact sum due to him upon the security of the debentures, assuming them to be valid, has not been finally determined. On November 25, 1922, Wood presented a petition for liquidation, and on January 10, 1923, the company was ordered to be wound up compulsorily. On July 4, 1923, Evans was adjudicated bankrupt, and Mr. Charles Thomas Appleby, the trustee in his bankruptcy, is the respondent to this summons, and, on behalf of Evans' creditors, asserts that the debentures cannot now be impeached.

It will be observed that the debentures were issued well over three months before the commencement of the winding up of the company. It would seem indeed that Evans had taken steps to ensure that, so far as the petitioning creditor was concerned, no petition by him would be presented within the three months beginning on June 19, 1922. For on June 29, 1922, an undertaking had been given to this creditor on behalf of the company to meet a two months' bill, which

was to be dated July 1, and would mature upon September 1, 1922, such bill to be accepted by the creditor in settlement of his account against the company. Had this bill been given and dishonoured, the petitioning creditor would in all probability have presented his petition for winding up within three months from June 19. Evans, therefore, changed the date of the bill from July 1 to July 21, 1922, and caused this fact to be announced to the creditor by a letter of July 7, which was in these terms: "Dear Sir, Enclosed bill as requested. Please note kindly that our Mr. Joseph Evans has altered the date to the 21st so that it will fall due on the 24th a much more convenient date for us." It could not matter to the company whether the bill fell due on the 24th rather than September 1, but it certainly was very much more convenient for Evans.

Topham K.C. and *R. Peel* for the liquidator. This application is based on Order LV., r. 71: *In re Gregory Love & Co.* (1) The debentures are bad under 13 Eliz. c. 5, as having been made with intent to delay and defraud creditors. In *In re Jackson & Bassford, Ld.* (2), the giving of the debenture was held to be bad, and the reason was stated by Buckley J. (3) That case came under the Companies Act, but here we must depend upon the statute of Elizabeth. There has been no case in which it has been applied to the issue of a debenture of a company. The essence of the statute was the purpose or intent to delay, hinder or defraud creditors. In *Spencer* v. *Slater* (4) a deed was held to be fraudulent and void under the statute, as tending to defeat or delay creditors. If the effect is to defeat the creditors, the burden is on the other party to show there was no intent. Vaughan Williams L.J. in *Maskelyne & Cook* v. *Smith* (5) states the reasons which should guide the Court in coming to a decision as to whether a deed is void or is not void under the statute. In *Ex parte Chaplin* (6) there was consideration for the assignment, but

(1) [1916] 1 Ch. 203.
(2) [1906] 2 Ch. 467.
(3) [1906] 2 Ch. 477.
(4) (1878) 4 Q. B. D. 13.
(5) [1903] 1 K. B. 671, 676.
(6) (1884) 26 Ch. D. 319.

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nevertheless the deed was held to be void. The question is, was there here a contrivance by which the debentures were held up in order to maintain the credit of the company, and then given to Evans at a time when it suited the company to give them? The principle governing these cases is well stated by Giffard L.J. in *Alton* v. *Harrison* (1), where the preference was honestly given. That principle should be applied to the facts in this case. The agreement of April, 1917, was a fraud upon the creditors.

Luxmoore K.C. and *J. B. Lindon* for the trustee in bankruptcy. The statute of 13 Eliz. has nothing to do with fraudulent preference, and has no application to this case. If there had been no agreement about the debentures Evans could have called for them. Apart from the Bankruptcy Acts, a debtor can pay his creditors in what order he likes. An agreement is not an assignment, and in a case like this it ceases to exist when the debenture is issued. *In re Jackson & Bassford, Ld.* (2), does not apply here. The reasoning of Bacon C.J. in *Ex parte Hodgkin* (3) applies with great force in this case, there being no substantial difference in the facts. The real test is, does the debtor retain any benefit for himself? An agreement not to give something cannot be a conveyance. This is an agreement to give a security when called for, and it could only be the giving of the security that would come within the statute of Elizabeth. An assignment to be void under the statute must be a mock assignment, whereby the assignor retains something for himself: see Fletcher Moulton L.J. in *Glegg* v. *Bromley.* (4) The judgment of Parker J. in the same case (5) shows that what the Court has to look at is the document which makes the assignment. There is no question here of any secrecy. What happened after giving the security does not affect the matter. The point is the giving of the security. Thesiger L.J. applied the same test in *Ex parte Games* (6) as Parker J. had done in *Glegg* v. *Bromley.* (5) All the cases

(1) (1869) L. R. 4 Ch. 622.
(2) [1906] 2 Ch. 467.
(3) (1875) L. R. 20 Eq. 746, 754–5.
(4) [1912] 3 K. B. 474, 485.
(5) [1912] 3 K. B. 492.
(6) (1879) 12 Ch. D. 314, 324.

referred to on behalf of the liquidator are cases of fraudulent preference. If there had been no agreement in 1917 no one could have impeached the debentures, issued in 1922, under the statute of Elizabeth. In *Twyne's Case* (1) the transaction was not a bona fide one at all. This case does not come within the statute of Elizabeth. *Holbird* v. *Anderson* (2) and *Middleton* v. *Pollock* (3) were also referred to.

Topham K.C. in reply. There is nothing to prevent this case coming within the statute of Elizabeth. All the facts of the case must be looked at. The whole thing was contrived from beginning to end for the benefit of the company. The delay in issuing the debentures was for its benefit, because they were issued to a friend who would do anything to help the company. The company could remain in possession, and the creditors could not sue. The transaction, from start to finish, shows a clear intention to defraud.

Cur. adv. vult.

March 10. ROMER J. Had a winding-up order been made upon a petition presented within three months from the issue of the debentures, they would undoubtedly have been void as a fraudulent preference for the reasons stated by Buckley J. in *In re Jackson & Bassford, Ld.* (4) In that case, the facts of which bear much resemblance to those of the present one, Buckley J. expressed himself as follows (5): "If a creditor of a corporation takes a promise to give a security in the future and holds it over so as not to injure the credit of his debtor, in order to escape the necessity of registering under s. 14 of the Act of 1900, and thus disclosing to the creditors the fact that there is an incumbrance, it seems to me that is evidence of an intention to commit an actual fraud upon the general creditors from whom that information is withheld." Evans could not therefore have relied upon the arrangement made in April, 1917, as negativing an intention to prefer him by the issue

(1) (1601) 3 Rep. 80*b*.
(2) (1793) 5 T. R. 235.
(3) (1875) 2 Ch. D. 104.
(4) [1906] 2 Ch. 467.
(5) [1906] 2 Ch. 477.

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of the debentures in June, 1922. The intention of Evans and the company throughout was that Evans should be preferred to the other creditors by an issue to him of debentures whenever the circumstances of the company should be such that it could no longer obtain credit.

Having regard however to the date at which the debentures were issued, the liquidator cannot avail himself of the provisions of s. 210 of the Companies Act, 1908. Nor can he avail himself of the provisions of s. 212. He bases his claim solely upon 13 Eliz. c. 5.

Now it was not disputed by Mr. Luxmoore that if the debentures in the present case were (to quote the words of the statute) "devised and contrived of malice fraud covin collusion or guile to the end purpose and intent to delay hinder or defraud creditors" of the company they are avoided by the statute as against the liquidator. Whether they were or were not so devised or contrived is the question that I have to determine.

The statute of Elizabeth has, as is well known, been the subject of judicial consideration in a great number of reported cases, to many of which my attention was called in argument. Those cases seem to establish the principle that a conveyance is not avoided by the statute merely because it is made with the intention of preferring, and does in the result prefer, one creditor of the grantor over the others. In *Alton* v. *Harrison* (1), Giffard L.J., in reference to a deed executed by a debtor at a time when he knew that a writ of sequestration would be issued against him, said (2): "If the deed is bona fide—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the statute of Elizabeth." In *Middleton* v. *Pollock* Jessel M.R. said (3): "The meaning of the statute is that the debtor must not retain a benefit for himself. It has no regard whatever to the question of preference or priority amongst the creditors of the debtor." In *Glegg* v. *Bromley* (4) a Mrs. Glegg, being indebted to

(1) L. R. 4 Ch. 622.
(2) L. R. 4 Ch. 626.
(3) 2 Ch. D. 104, 108–9.
(4) [1912] 3 K. B. 474.

one Hay under a judgment, executed an assignment of certain property to her husband to secure an antecedent debt. It was found as a fact that the assignment was executed deliberately with the object of defeating Hay's claim. The assignment was nevertheless held to be good as against him. Fletcher Moulton L.J. said (1): "Now it is well settled law that apart from the rules of bankruptcy a person may pay his debts in any order he pleases, and may charge his property as he will as security for paying those debts. The covenous assignments referred to in the 13 Elizabeth are mock assignments whereby in some form or other the assignor reserves some benefit to himself; but an out and out assignment by way of charge to secure an actual existing creditor is not within the class of assignments which are affected by that statute, and, as the facts prove to my satisfaction that this assignment comes under that class, I am satisfied that there is nothing to be made of the suggestion that it was void under the statute of Elizabeth."

Parker J. said (2): "Does a debtor who gives his creditor security with the intention of preferring him to other creditors or another creditor, and consequently defeating or delaying such other creditors or creditor, have an illegal intention within the meaning of the statute? In my opinion it is well decided that he has not, and as far as I can gather no distinction has ever been drawn in the cases between a preference given for fresh security and a preference given without any fresh security."

Now in the present case there can be no doubt that Evans committed a fraud upon the company's other creditors, that the company was a party to this fraud, and that, by reason of the fraud, a benefit was secured to the company. But the real fraud on the creditors consisted, not in taking the debentures, but in deliberately postponing their issue until June, 1922, so that the company should be enabled to obtain credit in the meantime. In the same way, it was not the issue of the debentures, but the postponement of that issue, that benefited the company. I cannot find in

(1) [1912] 3 K. B. 485. (2) [1912] 3 K. B. 492.

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the circumstances of the case anything more than fraudulent intention throughout to prefer Evans to the other creditors, carried into effect when the debentures were issued. But if, as appears to be established by the authorities, a present fraudulent intention to prefer one creditor over the others is not sufficient under the statute to avoid a conveyance to that creditor, unless the debtor is himself in some way benefited by the conveyance, I am unable to see how the conveyance is avoided merely because the debtor always had the intention to prefer the creditor at some time or another. I should have been glad if I had been able to avoid these debentures issued to Evans. But, in view of the authorities, I cannot, after giving the matter my best consideration, see how I can do so under the statute of Elizabeth: Mr. Topham has not suggested any other ground upon which I can do so at the instance of the liquidator. Whether any individual creditor who was induced to give credit to the company after April, 1917, has a right of action against Evans it is not necessary for me to determine. But in view of the authorities I do not see my way to declare these debentures to be void, as against the liquidator. It is, however, to be hoped that the Legislature, by extending the period of three months that is mentioned in s. 212 of the Companies Act or by some other means, may render impossible for the future a transaction similar to that which has taken place in the present case.

Solicitors for the liquidator: *Bell, Brodrick & Gray*, for *Cousins, Botsford & Co.*, Cardiff.

Solicitors for the trustee in bankruptcy: *Cochrane & Cripwell.*

P. J. B.

END OF VOL. AND OF CHANCERY SERIES FOR 1925.

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Principles enunciated by Lindley L.J. in *In re London and General Bank (No. 2)* [1895] 2 Ch. 673 applied by Romer J.

The definition of "wilful misconduct" by Lord Alverstone C.J. in *Forder* v. *Great Western Ry. Co.* [1905] 2 K. B. 532, 536 adopted by Pollock M.R. *In re* CITY EQUITABLE FIRE INSURANCE CO., LD. **Romer J. and C. A. 407**

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